Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

VOTERS EDUCATION COMMITTEE *et al.*
Petitioners,

v.

THE WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION *et al.*
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the First Amendment permits a State, by a surprising statutory construction, to require a speaker, on pain of serious punishment, to predict whether independent issue advocacy impliedly "supports" or "opposes" a candidate?

2. Whether footnote 64 of this Court in *McConnell v. FEC* overturns *sub silentio* precedent of this Court and the U.S. Courts of Appeals holding that the terms "support" and "oppose" are vague when used in a statute threatening serious punishment for those engaged in core First Amendment speech?

PARTIES TO THE PROCEEDINGS

The Petitioners here, who collectively were the plaintiffs/appellants below, are the Voters Education Committee, and its officers, Bruce Boram and Valerie Huntsberry (collectively "VEC" or "Petitioner").

The Respondents here fall into two categories: the defendants/respondents below, comprising the Washington State Public Disclosure Commission ("PDC"); Michael Connelly, Jeanette Wood, Francis Martin, Earl Tilly, and Jane Noland, Commissioners of the PDC; Vicki Rippie, Executive Director of the PDC; and Christine Gregoire, Attorney General of the State of Washington;[1] and the intervenor/respondent below, Deborah Senn.

CORPORATE DISCLOSURE STATEMENT

The Voters Education Committee was incorporated in Washington state in 2002. It is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 527.

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[1] Christine Gregoire no longer is Attorney General. Pursuant to this Court's Rule 35, the clerk will be informed that the present Attorney General, Rob McKenna, should be substituted as a Respondent.

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OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Washington, en banc, is reported as *Voters Education Committee v. Washington State Public Disclosure Commission*, 166 P.3d 1174 (Wash. 2007) and is located at Appendix ("Pet. App.") 1a. The December 11, 2007, decision of the Washington Supreme Court denying Petitioner's motion for reconsideration (77724-1) is unreported and is located at Pet. App. 77a. The August 31, 2005, order of the King County Superior Court (04-2-23551-1SEA) is unreported and is located at Pet. App. 56a.

JURISDICTION

This Petition seeks review pursuant to 28 U.S.C. § 1257(a) of a final judgment or decree of the highest court of the state in which a decision could be had where the constitutionality of a state statute was drawn into question and rights under the First Amendment to the Constitution of the United States were specially set up, claimed, and rejected. The opinion of the Supreme Court of Washington, en banc, was entered on September 13, 2007. A petition for reconsideration was timely filed, considered, and denied by unreported order on December 11, 2007. Pursuant to this Court's Rules 13.1 and 13.3, this Petition is submitted within 90 days of that order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment requires the states to provide "due process of law" and "equal protection of the laws."

Relevant provisions of the version of the Washington Fair Campaign Practices Act, Wash. Rev. Code, chapter 42.17 ("FCPA"), in effect at the time of Petitioner's speech and applied by the Washington courts below, are set forth at Pet. App. 172a-189a. However, the following portions are particularly relevant to this Petition:

> "Political committee" is defined to mean "any person (except a candidate or an individual

dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures *in support of, or opposition to*, any candidate or any ballot proposition." Wash. Rev. Code § 42.17.020(33) (emphasis added). (For convenience, this is referred to as the "support or oppose" standard.)

* * *

"Any person who fails to report a contribution or expenditure may be subject to a civil penalty equivalent to the amount he failed to report." *Id.* § 42.17.390(5).

* * *

"If the violation is found to have been intentional, the amount of the judgment . . . may be trebled as punitive damages." *Id.* § 42.17.400.

* * *

The FCPA preserves "other remedies." *Id.* § 42.17.390. The preserved remedies include section 40.16.030, which makes any person who "shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office . . . under any law of this state . . . guilty of a class C felony . . . punished by imprisonment . . . for not more than five years, or by a fine of not more than five thousand dollars, or by both."[1]

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[1] *See State v. Conte*, 154 P.3d 194, 202-03 (Wash. 2007) (holding that the penalty provisions of the FCPA are not exclusive and reinstating felony indictments for filing false campaign disclosure reports).

STATEMENT OF THE CASE

By its terms, the Washington statute here regulated independent speech that "supported" or "opposed" a candidate. Based on Washington and federal precedent, the state enforcement agency, PDC, and the Petitioner both understood that, to save the standard from vagueness and overbreadth, it had to be narrowly construed to apply only to express candidate advocacy. However, after Petitioner's speech was broadcast, the Supreme Court of Washington held that, under footnote 64 of this Court's opinion in *McConnell v. FEC*, 540 U.S. 93 (2003), the statutory terms were not vague at all, were not limited to express advocacy, and should be enforced to punish speech that, considered as a whole and in light of timing and other circumstances, clearly implied opposition to a candidate.

Certiorari should be granted because the Washington court's decision is directly contrary to decisions of the United States Courts of Appeals for the Fourth and Fifth Circuits, *Center for Individual Freedom, Inc. v. Carmouche*, 449 F.3d 655, 663 (5th Cir. 2006) ("*CFIF*"), and *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999), both of which held such "support or oppose" standards to be vague. The Washington decision also cannot be reconciled with decisions of this Court, most notably *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976), which held that the phrase "advocating the election or defeat of" a candidate was vague.

The Washington decision is important. It threatens nationwide uncertainty and widespread chill of core First Amendment speech by reopening the meaning of dozens of similar "support or oppose" state statutes which had come to be understood to require express advocacy. *See infra* at 19-21. That

chill will be enhanced because the Washington decision holds that such a new interpretation should be applied retroactively, at least if it does not overturn directly binding state authority. And because the Washington decision rests on a misconstruction of this Court's language in *McConnell*, an authoritative correction by this Court is particularly necessary.

* * *

On September 1, 2004, Petitioner VEC, a Washington non-profit corporation operating under section 527 of the Internal Revenue Code, began broadcasting a television ad concerning Washington's insurance crisis. The ad quoted Washington periodicals saying that a former Insurance Commissioner, Deborah Senn, had tried to cover up a transaction between her office and several insurance companies that "easily could lead to conflict-of-interest abuses," and urged viewers to log on to a website to "Learn More About The Insurance Crisis" and how the former Commissioner had "let us down."[2] The ad said nothing about an election or voting.[3] Although the former Insurance Commissioner then was running for Attorney General, the ad did not identify her as a candidate for any office, compare her to any other candidate, or call for any action concerning an election.[4]

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[2] The Washington court's detailed description of the ad appears in its decision. Pet. App. 3a-4a.

[3] Pursuant to federal communications law, the ad carried a mandatory disclosure that Petitioner was the sponsor. 47 C.F.R. §§ 73.1212, 76.1615.

[4] Petitioner ran a second ad similarly describing Ms. Senn's actions as Insurance Commissioner. Although the two ads were very similar, the PDC never subjected that second ad to an enforcement action. Pet. App. 3a-4a.

The PDC enforces the state's campaign finance laws. Wash. Rev. Code §§ 42.17.360, .370. On September 7, 2004, the PDC notified Petitioner that the ad was deemed to constitute "express advocacy," and, therefore, Petitioner was an unregistered "political committee" that unlawfully had failed to disclose its contributions and expenditures. Pet. App. 4a-5a. Petitioner immediately responded that its ad did not expressly advocate anyone's election or defeat and, therefore, it was not a political committee. Pet. App. 5a. That same day, the PDC voted to refer the case to the Washington Attorney General for enforcement action. *Id.* The PDC described the key issue as "what is 'express advocacy' [that] requires a committee to register and report." Pet. App 74a.

Washington's statutory definition of "political committee" made no mention of express advocacy, instead referring to spending "in support of, or opposition to, any candidate." Wash. Rev. Code § 42.17.020(33) (the "support or oppose" standard). However, the Washington precedent discussed *infra at* 9 strongly indicated that the statutory language should be narrowly construed to require express advocacy, and that understanding was widely shared—not just by private parties such as Petitioner, but by the state enforcement agency, the PDC. Pet. App 74a.

On September 10, 2004, Petitioner sued the PDC, seeking a declaratory judgment that the ad was not express advocacy and, hence, Petitioner was not a political committee.[5] Pet. App. 79a. Simultaneously,

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[5] The complaint alleged, *inter alia*, that the "advertising is protected speech under the First Amendment . . . as issue advocacy;" the PDC's actions "impermissibly chill the freedom of speech of any persons who want to participate in future issue

Washington's Attorney General brought an enforcement action on behalf of the PDC seeking penalties, including three times the amount spent by Petitioner on its ad.[6] Their complaint did not mention the statutory "support or oppose" standard. Instead, it recited the PDC's finding that Petitioner had violated "the state's public disclosure laws by running express advocacy ads and refusing to register or file as required by state law." Pet. App. 161a-163a.

The two cases were consolidated before a single trial judge and each side sought summary judgment. In its summary judgment briefing, the PDC shifted ground. It argued that the "distinction between 'express' and 'issue' advocacy contained in [*Washington State Republican Party v. Public Disclosure Commission*, 4 P.3d 808 (Wash. 2000)] as it relies on *Buckley* . . . is now irrelevant" and the court "no longer has an obligation to determine whether the ad in question constitutes 'express' or 'issue' advocacy." Pet. App. 165a.[7] Instead, according

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advocacy;" "the PDC has acted unconstitutionally and has erroneously interpreted or applied the law in finding apparent violations;" and sought a declaration that the "advertisements are protected speech," and an injunction against further enforcement based on the ads. Pet. App. 83a-86a.

[6] Since Petitioner had spent over $1 million broadcasting its ad, the requested penalty could include a fine of over $3 million. The statute is explicit that its trebling provision is "punitive." Wash. Rev. Code § 42.17.400. Faced with a threat of massive punishment, on September 13, 2004, Petitioner registered and disclosed to the PDC that the money for its ad came from a donation by the U.S. Chamber of Commerce, an incorporated entity. Pet. App. 6a.

[7] Pertinent portions of this and all other briefs referenced in this Petition are included in the Appendix.

to the PDC, the court should simply apply the law as written. Pet. App. 165a-166a. Alternatively, the PDC argued that the Petitioner's ad constituted express advocacy. Pet. App. 166a-170a. Petitioner's brief disagreed, contending that the statute was vague unless construed to require express advocacy, which its ad did not contain. Pet. App. 89a-117a.

The trial court granted PDC's motion for summary judgment. It held that *McConnell* had abolished the distinction between express and issue advocacy but that, in any event, the Petitioner's ad was express advocacy and therefore Petitioner was an unregistered political committee. Pet. App. 62a-64a. For identical reasons, the court ruled that Petitioner was liable for penalties in the enforcement action. Pet. App. 66a. Under agreement of the parties, the penalty phase of the enforcement action was stayed while Petitioner appealed the dismissal of its action for declaratory judgment. Pet. App. 7a.

The Washington Supreme Court ruled that, contrary to the original understanding of the PDC and Petitioner, it was legally irrelevant whether the ad constituted express advocacy. Relying exclusively on footnote 64 from *McConnell,* the Washington court held that the statutory language—whether Petitioner's speech "supported or opposed" a candidate—was not vague, required no narrowing construction, and should be applied as written.[5] Pet. App. 20a-21a.

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[5] At all stages of the proceeding, Petitioner contended that the Washington statute was unconstitutionally vague and overbroad unless it was limited to express advocacy. *See* Pet. App. 108a-130a, 132a-134a, 141a-144a. For example, Petitioner's brief on appeal argued that:

The two dissenting Justices took sharp issue with this reading of precedent. They said the "support or oppose" standard was not "sharply drawn" and did not provide the "heightened level of specificity and clarity . . . required by the First Amendment." Pet. App. 38a-39a. They pointed out that *Bare v. Gorton,* 526 P.2d 379, 386 (Wash. 1974), held unconstitutionally vague a provision of the same state statute that was defined using the same "support or oppose" language. Pet. App. 42a-44a. They also noted that, in a more recent case, *Washington State Republican Party,* 4 P.3d at 824, 832, the Washington court had ruled in broad terms that Washington law did not apply to "issue advocacy," but only to "express advocacy." Pet. App. 45a-46a. They also pointed out that footnote 64 of *McConnell* was expressly limited to "party speakers" and did not apply to "independent speech." Pet. App. 39a-40a.

The Washington majority said that the Washington precedent was not squarely on point and "binding," and it insisted that footnote 64 was universally applicable to all speech. Pet. App. 20a-21a. It held that Petitioner should have anticipated its ruling and so refused to rule on a "prospective basis that would

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> "[S]upport or oppose" is vague because this standard leaves political speakers wholly at the mercy of the PDC's interpretation of their speech. Whether an ad is found to "support or oppose" a given candidate depends to a significant degree on the beliefs of the candidate, the beliefs of the viewer, and the viewer's conception of what it means to "support" or "oppose" someone. . . . [T]his is the same problem that led . . . *Buckley* to reach "only . . . communications that include explicit words of advocacy of election or defeat of a candidate."

Pet. App. 116a-117a (citations and emphasis omitted).

not permit the PDC to impose a fine upon" Petitioner. Pet. App. 22a.

The court majority then applied the statutory "support or oppose" standard to the Petitioner's ad. Stressing that the ad opened by asking who Ms. Senn "is" (instead of "was"), the court found the ad "establish[ed] a contemporary focus." Pet. App. 23a. It then stressed the timing of the ad, noting that Ms. Senn's eight years as insurance commissioner had ended and she currently held no office. Pointing out that an election had been impending in which Ms. Senn was running, the court found the ad "had contemporary significance only with respect to [her] candidacy for attorney general." *Id.* The court said the ad's quotations from periodicals were not "neutral factual assertion[s]" that different viewers could assess differently because the ad "supplied viewers with a conclusion to be drawn from the advertisement—'Deborah Senn Let Us Down.'" Pet. App. 24a. From these considerations, the court concluded the ad "was clearly in opposition to Senn's candidacy" for Attorney General, and Petitioner "met this definition of 'political committee' when it ran the television advertisement." Pet. App. 23a-24a.

The court's analysis did not mention the ad's express visual call to non-voting action: "Learn More About the Insurance Crisis www.senninsurance crisis.com." Nor did it mention the parallel spoken call: "log on to learn more." The court did not question that there was an insurance crisis or that Ms. Senn's earlier conduct was relevant to it. Although the court said the ad's opposition to Senn was "clear," it did not find that was the only reasonable way to understand the ad.

In a lengthy footnote, the Washington court asserted that *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), simply was "not germane to this case" and its "analysis is unaffected" by the decision. Pet. App. 18a-19a. The Washington court noted that the dissent "fault[ed] our analysis" for failing to show the ad was "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Pet. App. 23a. The Washington majority said the point was immaterial since the case "does not involve applying the *WRTL II* standard for the functional equivalent of express advocacy." *Id.* Petitioner petitioned for reconsideration.[9] Its petition was considered but denied. Pet. App. 77a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the decision of the Washington Court is directly contrary to decisions of the Fourth and Fifth Circuits and cannot be reconciled with seminal precedent of this Court. Moreover, the decision chills core First Amendment speech nationwide, reopening the meaning of similar statutes in at least 30 states that had come to be narrowly construed to require express advocacy and

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[9] Petitioner's petition for reconsideration argued that (i) the court "misapprehend[ed] both *McConnell* and the statutory provision it was discussing" in footnote 64 which "by its terms reached only political party speakers, not all political speakers;" (ii) as a result, the "vagueness analysis [was] in conflict with *Buckley*, *McConnell*, and their progeny;" and (iii) "the retroactive application of a new rule regulating election speech on a context basis, which was forbidden under *Buckley*, to speech that has already taken place under the prior regulatory regime denies the speaker fair warning and due process." Pet. App. 146a-151a.

inviting other states and localities to legislate in similar terms.

I. THE WASHINGTON SUPREME COURT'S HOLDING IS CONTRARY TO DECISIONS OF THE U.S. COURTS OF APPEALS AND THIS COURT

The Washington court's central holding is that a penal statute that requires a speaker to predict whether independent public advocacy "supports or opposes" a candidate fully satisfies the First Amendment's heightened requirement of precision so that no narrowing construction is required:

> We conclude that the words "in support of, or opposition to, any candidate" are not vague and that the definition of "[p]olitical committee" . . . is not unconstitutionally vague.[10]

That facial holding is directly contrary to the Fifth Circuit's *CFIF* decision. *CFIF* concerned a Louisiana statute that required reporting and disclosure if

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[10] Pet. App. 23a. This was a facial holding. By challenging the Washington statute both on its face and as applied to the ad, Petitioner asserted the right of all speakers to be free of a vague threat. *See Plummer v. Columbus*, 414 U.S. 2, 3 (1973) (per curiam) (facial vagueness challenges are proper). This facial ruling was not, and could not properly have been, based on any specific characteristic of Petitioner. *Id.* The Washington court also held that the statute was not vague as applied to Petitioner, and that Petitioner could be punished for failing to anticipate that surprising ruling. Pet. App. 22a. Although the Washington court criticized Petitioner because of its status as a political organization under section 527 of the federal tax code, Pet. App. 24a, it did not rely on that point and it is irrelevant here. The Federal Election Commission has explained why any reliance on section 527 status would be in error. 72 Fed. Reg. 5595, 5598 (Feb. 7, 2007). *See also* Pet. App. 137a-141a.

a person made a payment "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person." 449 F.3d at 662-63 (discussing La. Rev. Stat. §§ 18:1501.1(A); 18:1483(9)(a)). The Fifth Circuit held this "a vague statute" and ruled that:

> To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle . . . and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate.[11]

The Washington decision also directly conflicts with the Fourth Circuit's *Bartlett* decision. *Bartlett* held fatally vague North Carolina's definition of a "political committee" as an entity whose purpose is to "support or oppose any candidate or political party or to influence or attempt to influence the result of an election." 168 F.3d at 712 (quoting N.C. Gen. Stat. § 163-278.6(14)). *Bartlett* did not attempt to save the vague provision by construing it narrowly because it found that doing so would be contrary to legislative intent. *Id.* at 713. *See also Anderson v. Spear*, 356 F.3d 651, 663-65 (6th Cir. 2004) (a statute defining

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[11] *CFIF*, 449 F.3d at 665. The Louisiana statute included a reference to speech "otherwise influencing" an election, a phrase that did not appear in the Washington statute. La. Rev. Stat. § 18:1483(9)(a). However, the Fifth Circuit did not limit its vagueness finding or its narrowing construction to that phrase, as it would have if it had found that the "supporting [or] opposing" clause met First Amendment standards of precision. Instead, it narrowed the entire clause to express advocacy, thus precluding Louisiana from demanding reporting and disclosure on the basis of speech that "supported" or "opposed" a candidate without using express advocacy. *CFIF*, 449 F.3d at 665.

"electioneering" as the "solicitation of votes for or against any candidate" was "vague" and, *despite McConnell*, must be narrowly construed to require express advocacy).

CFIF and *Bartlett* are firmly rooted in *Buckley*. There, the court of appeals had sought to cure the federal statute's vagueness by construing it narrowly to apply only to speech "advocating the election or defeat of" a candidate. *Buckley*, 424 U.S. at 42. This Court said the court of appeals had moved in the right direction, but "was mistaken in thinking that this construction eliminate[d] the problem of vagueness altogether." *Id.* This Court explained that the court of appeals construction would involve assessing "intent and effect" with vagueness and chilling effects. *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945) ("[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . In these conditions it blankets with uncertainty whatever may be said.")). The Court held that vagueness could "be avoided only by [requiring] explicit words of advocacy of election or defeat." *Id.* at 43-44 & n.52.

"[A]dvocating the election or defeat" of a candidate is, if anything, a more precise test than the more subjective "support or oppose" standard. Yet *Buckley* held the advocacy formulation to be vague, not because of a semantic quirk but because of the inherent difficulty in assessing the intent and effect of speech. *Id.* at 43. Thus, the Washington court's holding that "supporting" or "opposing" meets First

Amendment standards of precision is contrary to *Buckley*, as functionally implemented by the courts of appeal in *CFIF* and *Bartlett*.

Buckley was not the first of this Court's decisions to find the words "support" and "oppose"—which are different sides of the same coin—to be inherently vague. During the middle of the last century, the Court faced a series of cases challenging various types of loyalty oaths phrased specifically in terms of "supporting" or "opposing." The Court's ultimate solution was to construe prospective oaths to "support" country, state, and constitution, and "oppose" their enemies as "amenities" that merely required compliance with other laws, thus rendering them harmless. *Cole v. Richardson*, 405 U.S. 676, 678-85 (1972) (harmonizing authority and explaining that, although "oppose" would be vague and could be invalidated if used in the type of consequential oath at issue in *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961), it was tolerable as part of the essentially meaningless "amenity" oath before the Court). On the other hand, the Court struck down as facially vague oaths that used "support" or "oppose" to impose specific obligations or liabilities, particularly if they burdened First Amendment rights. *Id. See Cramp*, 368 U.S. at 279 ("support" is vague); *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964) (noting that experience teaches that some people always will try to push legal standards to their limits; therefore "[w]ell intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law").

The Washington statute is not a mere amenity. It burdens core First Amendment rights on pain of serious punishment. Indeed, Petitioner faces

exposure to a multi-million dollar penalty, based on a surprising finding that its ad "opposed" a candidate.[12] Thus, this is precisely the type of use for which this Court and the Fourth and Fifth Circuits have held that "support," "oppose," and similar terms are impermissibly vague.

II. THE WASHINGTON COURT MISCONSTRUED FOOTNOTE 64 OF *MCCONNELL*

Notwithstanding all of the above, the Washington court held that *McConnell*'s footnote 64, by itself, conclusively established that the words "support" and "oppose" are not vague. If that were so, it would mean *McConnell* had, via footnote, overruled a holding of *Buckley*, as well as that of *Cramp* and *Cole*, without even acknowledging it was doing so, and that the Fifth Circuit had failed to appreciate this seismic shift. In fact, *McConnell*'s footnote 64 did no such thing.

Footnote 64 concerned a provision that blocked circumvention of federal contribution limits by "prevent[ing] donors from contributing nonfederal funds to state and local party committees to help finance 'Federal election activity.'" *McConnell*, 540 U.S. at 161-62 (discussing 2 U.S.C. § 441i(b)(1)). The statute defined "federal election activity" to include public communication by a state or local party committee that "promotes," "supports," "attacks," or "opposes" a "clearly identified candidate for Federal office." *Id.* Thus, on its face, the legislative standard defined the category of restricted contributions using three elements: (i) a political party speaker, (ii) a

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[12] The Washington court held that Petitioner should have adjusted its speech to anticipate its ruling and, therefore, Petitioner is subject to punishment for its violation. Pet. App. 22a.

clearly identified candidate, and (iii) promoting, attacking, supporting, or opposing that candidate.

McConnell noted that "close ties" inside national political parties led their state and local party committees to serve as "an alternative avenue" and "simply 'pass throughs' to the vendors assisting a party's federal candidate." *Id.* at 164-65 & n.60. It also noted that, under *Buckley*, "actions taken by political parties are presumed to be in connection with election campaigns." *Id.* at 170 & n.64.[13] Invoking that presumption, footnote 64 held that the "words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential *party speakers* must act in order to avoid triggering the provision, [providing] explicit standards for those who apply them." *Id.* (emphasis added; internal quotations omitted).

This was not a holding that the terms "support" or "oppose" were sufficiently clear, standing alone, to subject all core speech to regulation. If it were, *McConnell's* emphasis on the limitation to party speech and on the *Buckley* presumption would be superfluous. To the contrary, "support" and "oppose"

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[13] Political parties and their candidates are intimately connected. It is for this reason that this Court has provided substantial protections under the First Amendment to the process by which parties choose their candidates. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574-77 (2000). Candidates are the party's messengers to the electorate. *Id.* at 575. That same intimate connection between parties and candidates arguably justifies the Court's conclusion in *McConnell's* footnote 64 that, in the specific and limited context of political party advertising regarding a clearly identified candidate, "support" or "oppose" needed no additional limiting construction. The Washington court, however, has expanded that limited holding to all political speech.

were used to narrow coverage of speech that, by virtue of the other two objective elements of the definition, already was closely related to an election:

- First, the speech had to be by a political party and, hence, presumed to be campaign-related as a matter of law.
- Second, the speech had to concern a clearly identified candidate, assuring that the speech was of the type to which the presumption logically applied.
- Third, that subset was further limited to speech that promoted, attacked, supported, or opposed the identified candidate.[14]

By contrast, the Washington statute has no objective elements. It does not even require that a candidate be clearly identified, though the Petitioner's ad did refer to Ms. Senn. Under the statute's language, the sole test is whether, after the fact, a regulator declares that independent speech supported or opposed some candidate. This is precisely the type of vague standard *Buckley* condemned. 424 U.S. at 43 (rejecting any test "that puts the speaker . . . wholly at the mercy of the varied understanding of his listeners and consequently of whatever inference may be drawn as to his intent and meaning") (quoting *Thomas*, 323

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[14] Although non-party donors who fund political party speech have to apply the test, they would be guided by these three standards that apply to party speech. This is not to imply that footnote 64 is correct. The Court may well wish to reconsider it at some point. But, given its failure to acknowledge or discuss precedent holding that terms such as "support" and "oppose" do not provide the clarity necessary to restrict speech, the footnote certainly should be given a narrow reading, rather than treated as an expansive and revolutionary doctrine.

U.S. at 535); *see also WRTL II*, 127 S. Ct. at 2665-66, 2669 & n.7 (discussing and applying *Buckley*).

III. THE WASHINGTON COURT'S HOLDING THAT THE PHRASE "SUPPORT OR OPPOSE" IS NOT VAGUE THREATENS FREE SPEECH NATIONWIDE

The Washington court's ruling creates a nationwide threat to free speech. As the *CFIF* and *Bartlett* decisions demonstrate, state campaign finance statutes frequently employ vague standards, often the same "support or oppose" language employed by Washington. These provisions—which plainly do not provide the precise and objective standard demanded by *Buckley*, 424 U.S. at 43-44—generally have come to be understood as requiring express advocacy. But the Washington decision reopens that issue as to all of them. Speakers now may expect to encounter claims that the clauses either require no narrowing construction or are being construed to encompass any speech that supports or opposes a candidate. And, given the Washington court's holding that its surprising statutory construction was fully retroactive, speakers will have to hedge, trim, and steer clear of *possible* future statutory constructions that are not clear today.

States employ a variety of vague terms that seek to regulate political activity. The Appendix, at Pet. App. 190a-195a, includes a sampling of vague provisions from thirty states whose meaning is thrown into doubt by the Washington opinion, including, for example, the following:

- The District of Columbia defines a "political committee" to include a group "engaged in . . . promoting or opposing the . . . election of an

individual to office." D.C. Code § 1-1101.01(5). Excluded from the definition of "contribution" are any "[c]ommunications . . . by any organization which . . . neither endorse nor oppose any candidate." *Id.* § 1-1101.01(6)(B)(iv).

- Idaho defines a "political committee" to include a group that makes expenditures "for the purpose of supporting or opposing one or more candidates." Idaho Code Ann. § 67-6602(p)(2). An expenditure is a transfer "for the purpose of . . . assisting in furthering or opposing any election campaign." *Id.* § 67-6602(h).
- Illinois defines a "political committee" to include a group that makes "expenditures . . . in opposition to a candidate." 10 Ill. Comp. Stat. 5/9-1.9.
- Louisiana requires reporting and disclosure of a person who makes a payment "for the purpose of supporting, opposing, or otherwise influencing" an election. La. Rev. Stat. §§ 18:1501.1(A), 18:1483(9)(a).
- Vermont defines a "political committee" to include a group that accepts contributions or makes expenditures "for the purpose of supporting or opposing any campaign." Vt. Stat. Ann. tit. 17, § 2103(22). "Contribution" and "expenditure" are defined to include transfers "for the purpose of supporting or opposing" any campaign. *Id.* § 2103(9), (12).

Before the Washington decision, a speaker could be reasonably confident that these various formulations would be understood to require a narrowing

construction, typically "express advocacy."[15] Now, however, speakers face a substantial risk that many of these provisions may be construed retroactively to regulate all speech that a regulator, prosecutor, or court may view as "supporting" or "opposing" a candidate. To protect against that threat, independent speakers will self-censor. In short, the Washington decision threatens our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). This threat warrants this Court's attention.

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[15] In some states, judicial holdings support an express advocacy construction. *See, e.g., CFIF*, 449 F.3d at 665-66; *Bartlett*, 168 F.3d at 712-13; *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1194 (10th Cir. 2000); *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 430 (Minn. 2005); *League of Women Voters of Colo. v. Davidson*, 23 P.3d 1266, 1277-78 (Colo. Ct. App. 2001); *Klepper v. Christian Coalition of N.Y., Inc.*, 259 N.Y.S.2d 926 (N.Y. App. Div. 1999). In other states, there are opinions by Attorneys General, *see, e.g.*, Del. Att'y Gen. Op. 00-IB17, 2000 WL 1920140 (Oct. 25, 2000), or state agencies, *see, e.g.*, Ky. Registry of Election Fin. Op. 2006-001 (Mar. 9, 2006) *available at* http://kref.ky.gov/NR/rdonlyres/4380CBD9-9F58-450A-8E4F-B14838EAB511/0/AO06001.pdf (last visited Feb. 25, 2008); Mich. Sec'y of State, Declaratory Ruling 1-04-CI (April 20, 2004) *available at* http://www.michigan.gov/documents/2004_126239_7.pdf (last visited Feb. 25, 2008); Ga. State Ethics Comm'n, Adv. Op. 2001-32 (June 29, 2001), *available at* http://ethics.georgia.gov/EthicsWeb/references/opinions/sec2001-32.aspx (last visited Feb. 26, 2008). In other states, an informal understanding exists, reflected in practice.

CONCLUSION

Certiorari should be granted to review the decision of the Washington Supreme Court.

Respectfully submitted,

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March 10, 2008

APPENDIX

APPENDIX A

SUPREME COURT OF WASHINGTON
EN BANC

No. 77724-1

VOTERS EDUCATION COMMITTEE, a Washington corporation; BRUCE BORAM, an individual; VALERIE HUNTSBERRY, an individual,
Appellants,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION; MICHAEL CONNELLY, JEANETTE WOOD, FRANCIS MARTIN, EARL TILLY, and JANE NOLAND, Commissioners of the Washington State Public Disclosure Commission in their individual capacities; VICKI RIPPIE, Executive Director of the Washington State Public Disclosure Commission; and CHRISTINE GREGOIRE, Attorney General of the State of Washington in her individual capacity,
Respondents,

and

DEBORAH SENN,
Respondent / Intervenor.

Argued May 25, 2006
Decided Sept. 13, 2007

FAIRHURST, J.

During the 2004 campaign for Washington State Attorney General, the Voters Education Committee

(VEC)[1] sponsored television advertisements without registering as a "political committee" or disclosing information about its contributions and expenditures. The Washington State Public Disclosure Commission (PDC)[2] brought an enforcement action against VEC for failure to register and disclose. In response, VEC brought this constitutional claim against the PDC, alleging that the PDC was unconstitutionally regulating VEC's political speech. The trial court granted summary judgment to the PDC, holding that VEC's advertisement "Better" constituted "express advocacy" rather than "issue advocacy" and that, as a result, VEC was a political committee subject to regulation. On direct appeal, VEC argues that the definition of "political committee" is vague and that the trial court erred in applying the distinction between express advocacy and issue advocacy.

We hold that the definition of "'[p]olitical committee'" in former RCW 42.17.020(33) (2002) is not vague. We further hold that VEC met the definition of a political committee. As a result, we hold that the PDC did not unconstitutionally infringe on VEC's free speech rights by seeking to compel VEC to register as a political committee and to disclose its contributions and expenditures. Because the regulation at issue is not vague, we need not reach the issue of whether the trial court correctly applied the distinction between express advocacy and issue advocacy. We also hold that article I, section 5 of the

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[1] This opinion refers collectively to all of the appellants, including the Voters Education Committee, Bruce Boram, and Valerie Huntsberry, as VEC.

[2] This opinion refers collectively to all of the respondents, including the Washington State Public Disclosure Commission, Michael Connelly, Jeanette Wood, Francis Martin, Earl Tilly, Jane Noland, Vicki Rippie, and Christine Gregoire, as the PDC.

Washington Constitution does not provide greater protection against disclosure requirements than does the first amendment to the United States Constitution. We affirm the trial court's dismissal of VEC's constitutional claims.

I. FACTUAL AND PROCEDURAL HISTORY

Beginning on September 1, 2004, VEC sponsored two television advertisements criticizing Deborah Senn, Washington's former insurance commissioner. At the time, Senn was a candidate for attorney general of Washington. The advertisements aired on television stations throughout the state until approximately September 8, 2004. The primary election occurred on September 14, 2004.

The television advertisement at issue in this case was entitled "Better" and included a voice-over narration in combination with on-screen text and images. The script of the voice-over narration read:

> Who is Deborah Senn looking out for?
>
> As Insurance Commissioner, Senn suspended most of a $700,000 fine against an insurance company . . . in exchange for the company's agreement to pay for four new staff members in Senn's own office.
>
> Senn even tried to cover up the deal from State Legislators.
>
> The *Seattle Post-Intelligencer* said Senn's actions "easily could lead to conflict-of-interest abuses."
>
> Deborah Senn let us down . . . log on to learn more.

Clerk's Papers (CP) at 51 (ellipsis in original).[3]

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[3] A second television advertisement sponsored by VEC, entitled "New," aired during the same time period as "Better." The

During the voice-over narration, the following combinations of text and images appeared on the screen:

> Text on black background: "Who is Deborah Senn looking out for?"
>
> Text with image of money: "Suspended Most of $700,000 Fine *Source: Seattle Times 2/20/97*"
>
> Text with image of Insurance Commissioner's office: "In Exchange for New Staff in Her Office *Source: Seattle Times 2/20/97*"
>
> Text with image of Washington State Capital: "Tried to Cover Up Deal from State Legislators *Source: Seattle Times 2/20/97*"
>
> Text with image of newspaper, *Seattle Post-Intelligencer* banner head: "'. . . easily could lead to conflict-of-interest abuses.' *2/27/97*"
>
> Text on black background:
>
> "Deborah Senn Let Us Down
>
> Learn More About the Insurance Crisis
>
> www.senninsurancecrisis.com
>
> Paid for by Voters Education Committee."

Dec. of Vicki Rippie (Sept. 10, 2004), Attach. E (videotape of KIRO TV Sept. 3, 2004 advertisement) (Rippie Dec.).

On September 7, 2004, the PDC sent a letter to VEC stating its opinion that VEC's advertisements constituted express advocacy and directing VEC to register as a political committee and to "file all

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PDC did not include "New" in its enforcement proceedings against VEC. As a result, "New" is not pertinent to this case.

reports of contributions received and expenditures made by the committee to date."[4] CP at 611. On September 9, 2004, VEC responded through its counsel that it did not believe that it was "subject to registration or reporting under Washington law." CP at 447. That same day, the PDC held a special commission meeting and "found apparent multiple violations" of Washington campaign financing laws by VEC. CP at 450. The PDC referred the matter to the Washington State Attorney General's office "for appropriate action . . . including seeking a court order compelling [VEC] . . . to file the disclosure reports required." *Id.*

On September 10, 2004, the PDC initiated an enforcement action in Thurston County Superior Court to compel VEC to comply with the registration

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[4] The dissent claims that the PDC, based on its "subjective designation" that VEC's advertisement "was 'malign[ing]' Ms. Senn's character" "labeled [VEC] a 'political committee'" and subjected it to "prior registration and disclosure requirements." Dissent at 1190 (first alteration in original). The dissent's characterization of the regulations at issue here as the "*prior* registration and disclosure requirements" is inaccurate. *Id.* (emphasis added); *see* discussion, *infra*, at 1187.

Moreover, as this excerpt from the PDC's letter to VEC reveals, the PDC's conduct was hardly as whimsical as the dissent seems to imply:

> After reviewing a broadcast advertisement of [VEC], PDC staff has concluded that the ad is "express advocacy" as that term is used in . . . *Washington State Republican Party v. Washington State Public Disclosure Commission et al.*, 141 Wash.2d 245, 4 P.3d 808 (July 27, 2000). When advertising maligns a candidate's character, it is "express advocacy." As such, the activities of [VEC] are reportable to the [PDC] under chapter 42.17 RCW.

CP at 611.

and reporting requirements and seeking penalties for noncompliance. *State ex rel. Wash. State Pub. Disclosure Comm'n v. Voters Educ. Comm.*, No. 04-2-01845-2, Thurston County Superior Court (*PDC v. VEC*). At the same time, VEC initiated this action in King County Superior Court against the PDC under 42 U.S.C. § 1983 seeking a declaratory judgment that VEC's advertisements were protected speech under the first amendment to the United States Constitution and under article I, section 5 of the Washington Constitution. VEC also sought attorney fees under 42 U.S.C. § 1988 and other statutes. The PDC's enforcement proceeding was later transferred to King County Superior Court and assigned to the same judge as VEC's case. *PDC v. VEC*, No. 04-2-33247-8-SEA, King County Superior Court.

After these cases were filed, VEC agreed to register with the PDC and filed reports documenting contributions to VEC and VEC's expenditures. VEC's disclosures indicated that the committee had received a single contribution from the United States Chamber of Commerce in the amount of $1.5 million and that VEC had spent more than $1.4 million of that amount. On September 21, 2004, Deborah Senn moved to intervene in the case, and the trial court subsequently granted her motion.

Prior to trial, VEC moved for summary judgment. On August 12, 2005, following oral argument on the summary judgment motion, the trial court issued an oral ruling that VEC's advertisement was not protected speech that was beyond the reach of regulation by the PDC and that VEC had failed to prove its constitutional claims. The court denied VEC's summary judgment motion and dismissed the case.

VEC sought direct review by this court, and we agreed to retain the case.[5]

II. ISSUES

A. Whether the PDC unconstitutionally infringed on VEC's First Amendment rights by enforcing disclosure requirements.

1. Whether the definition of "'[p]olitical committee'" in former RCW 42.17.020(33) is unconstitutionally vague.

2. Whether the trial court properly applied the distinction between express advocacy and issue advocacy.

B. Whether article I, section 5 of the Washington Constitution provides greater protection against disclosure requirements than the First Amendment.

C. Whether VEC is entitled to attorney fees and expenses.

III. ANALYSIS

A. The PDC did not unconstitutionally infringe on VEC's First Amendment rights by enforcing disclosure requirements

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

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[5] The trial court also granted partial summary judgment for the PDC in *PDC v. VEC*, the PDC's enforcement case. The trial court has not yet proceeded to the remedy phase in that case. Although VEC also filed a motion for discretionary review in *PDC v. VEC*, No. 77725-0 in this court, VEC withdrew its motion after the parties stipulated to a stay of proceedings in the trial court, pending the outcome in this case.

petition the government for a redress of grievances." This court has recognized time and again the particular importance of protecting political speech. "[T]he United States Supreme Court and this court have remained steadfast in protecting the right to full and vigorous discussion of political issues, free from government regulations." *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wash.2d 245, 250, 4 P.3d 808 (2000) (*WSRP*).

At the same time, the citizens of Washington have repeatedly declared their strong commitment to disclosing the identity of and financing behind political speakers. In 1972, the citizens of Washington passed Initiative Measure No. 276, which formed the basis of Washington's campaign finance laws and established the PDC. *See* RCW 42.17.350. Part of Initiative 276 provides:

> It is hereby declared by the sovereign people to be the public policy of the state of Washington:
>
> (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.
>
> . . . .
>
> (10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.
>
> . . . .
>
> The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying . . . so as to

> assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.

RCW 42.17.010. As this court has recognized, the purpose of Initiative 276 is "to ferret out . . . those whose purpose is to influence the political process and subject them to the reporting and disclosure requirements of the act in the interest of public information." *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wash.2d 503, 508, 546 P.2d 75 (1976).

In 1992, the citizens of Washington also passed Initiative Measure No. 134, which, together with Initiative 276, is generally referred to as the Fair Campaign Practices Act (FCPA), chapter 42.17 RCW. The FCPA requires political committees to register with the PDC and provide information about the committee, contributions to the committee, and the committee's expenditures. *See* RCW 42.17.040-.090. The FCPA defines "'[p]olitical committee'" as "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." Former RCW 42.17.020(33). As a result, at the time of VEC's advertisements, if VEC met the definition of a "political committee," the FCPA required that VEC register with and disclose its contributions and expenditures to the PDC.[6]

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[6] Recent amendments to the FCPA have likely altered the requirement that only a political committee must disclose its contributions and expenditures to the PDC. RCW 42.17.565 now requires the sponsor of electioneering communications to report

Standard of Review

VEC appeals the trial court's grant of summary judgment to the PDC, arguing that the definition of "political committee" is unconstitutionally vague and that, as a result, the PDC violated VEC's First Amendment rights by compelling VEC's disclosures. This court reviews motions for summary judgment de novo. *Berrocal v. Fernandez*, 155 Wash.2d 585, 590, 121 P.3d 82 (2005). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). Here, there is no genuine issue of material fact. Therefore, we need only decide

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the sponsor's identity to the PDC and to disclose information about its contributions and expenditures. The legislature also amended RCW 42.17.020 to include a new definition of "'[e]lectioneering communication.'" Laws of 2005, ch. 445, § 6. The definition of "'[e]lectioneering communication'" now includes:

> [A]ny broadcast, cable, or satellite television or radio transmission . . . that:
>
> (a) Clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate's name;
>
> (b) Is broadcast, transmitted, mailed, erected, distributed, or otherwise published within sixty days before any election for that office in the jurisdiction in which the candidate is seeking election; and
>
> (c) Either alone, or in combination with one or more communications identifying the candidate by the same sponsor during the sixty days before an election, has a fair market value of five thousand dollars or more.

RCW 42.17.020(20). As a result, the definition of "political committee" is no longer the sole determining factor of whether the sponsor of a political advertisement must disclose contribution and expenditure information to the PDC.

whether the PDC's regulation of VEC's political speech was unconstitutional as a matter of law. This court also reviews interpretations of statutes and determinations of the constitutionality of statutes de novo. *In re Parentage of C.A.M.A.*, 154 Wash.2d 52, 57, 109 P.3d 405 (2005).

In general, "'[a] statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.'" *State v. Hughes*, 154 Wash.2d 118, 132, ¶ 25, 110 P.3d 192 (2005) (quoting *State v. Thorne*, 129 Wash.2d 736, 769-70, 921 P.2d 514 (1996)), *overruled in part on other grounds by Washington v. Recuenco*, ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). However, as VEC notes, in the First Amendment context the burden shifts and the State usually "bears the burden of justifying a restriction on speech." *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997).

While we must scrutinize any regulation of speech, the particular type of regulation the PDC seeks to enforce in this case also impacts our consideration of the constitutionality of that regulation. Much of VEC's discussion of the regulation of its political speech presumes a *limitation* of that speech, as occurs with limits on political contributions or expenditures. The regulations at issue in this case, however, are disclosure requirements. The United States Supreme Court has recognized that compelled disclosure may encroach on First Amendment rights by infringing on the privacy of association and belief. *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). As a result, the Court has held that disclosure

regulations must survive "exacting scrutiny" and that there must be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed. *Id.* (internal quotation marks omitted).

However, the Court has also recognized that unlike "overall limitations on contributions and expenditures, . . . disclosure requirements impose no ceiling on campaign-related activities." *Id.* The Court has also observed that "[t]he governmental interests sought to be vindicated by . . . disclosure requirements," such as providing the electorate with information and deterring corruption and the appearance of corruption, are "sufficiently important to outweigh the possibility of infringement."[7] *Id.* at 66, 96 S. Ct. 612. Therefore, the Court concluded that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Id.* at 68, 96 S.Ct. 612.

As the PDC notes, the right to free speech "includes the 'fundamental counterpart' of the right to receive information." Am. Br. of Resp'ts at 12 (quoting *Fritz v. Gorton*, 83 Wash.2d 275, 296-97, 517 P.2d 911 (1974)). "The constitutional safeguards which shield and protect the communicator, perhaps more importantly also assure the public the right to *receive*

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[7] The dissent states, "[d]istressingly, there is no evidence to support the claim that [VEC's] private speech triggered any compelling state interest. There is no suggestion of corruption or influence peddling." Dissent at 1197. Contrary to the dissent's implication, there need be no evidence of corruption on VEC's part to find that the FCPA registration and disclosure regulations promote a compelling government interest in deterring corruption and the appearance of corruption.

information in an open society." *Fritz*, 83 Wash.2d at 297, 517 P.2d 911. In *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), the United States Supreme Court considered the relationship between the disclosure requirements in the Bipartisan Campaign Reform Act of 2002 (BCRA) and the First Amendment values of "uninhibited, robust, and wide-open" political speech.

> "BCRA's *disclosure provisions require . . . organizations to reveal their identities* so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. *Plaintiffs challenge* BCRA's restrictions on electioneering communications *on the premise* that they should be permitted to spend . . . funds . . . on broadcast advertisements, which refer to federal candidates, because *speech needs to be uninhibited, robust, and wide-open.* Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: The Coalition-Americans Working for Real Change (funded by business organizations opposed to organized labor), Citizens for Better Medicare (funded by the pharmaceutical industry), Republicans for Clean Air (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs *never satisfactorily answer the question of how uninhibited, robust, and wide-open speech can occur when organizations hide themselves from the scrutiny of the voting public.* Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious *First*

> *Amendment* values that Plaintiffs argue are trampled by BCRA, but ignores the competing *First Amendment* interests of individual citizens seeking to make informed choices in the political marketplace."

Id. at 196-97, 124 S. Ct. 619 (emphasis added) (citations omitted) (internal quotation marks omitted) (quoting *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 237 (D.D.C.2003)). As the *McConnell* Court observed, disclosure requirements "'d[o] not prevent anyone from speaking.'" 540 U.S. at 201, 124 S.Ct. 619 (alteration in original) (quoting *McConnell*, 251 F. Supp. 2d at 241). With this context in mind, we consider whether the FCPA's disclosure regulations unconstitutionally burdened VEC's speech.

1. The definition of "'[p]olitical committee'" in former RCW 42.17.020(33) is not unconstitutionally vague

The United States Supreme Court has repeatedly recognized that a vague regulation of speech infringes on First Amendment rights. *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."). This court has also recognized that "'[i]f speakers are not granted wide latitude to disseminate information without government interference, they will steer far wider of the unlawful zone.'" *WSRP*, 141 Wash.2d at 265 (internal quotation marks omitted) (quoting *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 54-55 (2d Cir. 1980)). "'This danger is especially acute when an official agency of government has been created to

scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled or sterilized.'" *Id.*

Under the Fourteenth Amendment, a statute may be void for vagueness "if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *O'Day v. King County*, 109 Wash.2d 796, 810, 749 P.2d 142 (1988) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)). Moreover, the Supreme Court has "repeatedly emphasized that where First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential." *Id.* (citing, *e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975)).

VEC argues that the definition of "political committee" is unconstitutionally vague. The PDC argues that the definition of "political committee" is not vague or that, in the alternative, if this court finds that the definition is vague, this court should construe the definition in a limiting way so as to preserve the constitutionality of the statute. In analyzing this issue, we first turn to the United States Supreme Court's seminal decision in *Buckley*.

In *Buckley*, the United States Supreme Court considered the constitutionality of a provision of the Federal Election Campaign Act of 1971 (FECA) that limited campaign expenditures "'relative to a clearly identified candidate.'" 424 U.S. at 13, 96 S. Ct. 612 (quoting former 18 U.S.C. § 608(e)(1) (1974)). The

Court concluded that the phrase "relative to" was vague in that it "fail[ed] to clearly mark the boundary between permissible and impermissible speech." *Id.* at 41, 96 S. Ct. 612. However, in order to avoid rendering the statute unconstitutional, the Court adopted a saving construction of the statute. The Court construed the statute to apply only to expenditures for communications that expressly advocated the election or defeat of a clearly identified candidate. *Id.* at 42-44, 80, 96 S. Ct. 612. The Court supplied examples of words that would constitute express advocacy, "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n. 52, 96 S. Ct. 612. However, the Court also recognized that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42, 96 S. Ct. 612.

Following *Buckley*, this court considered the constitutionality of FCPA provisions limiting campaign expenditures in the context of an advertisement that criticized Gary Locke, then a candidate for governor. *WSRP*, 141 Wash.2d at 250-51, 4 P.3d 808. The advertisement listed facts that indicated Locke's position on fighting crime, such as voting "no" on the "Three Strikes, You're Out" law. *Id.* at 251, 4 P.3d 808 (internal quotation marks omitted). The advertisement ended by directing viewers to "Tell Gary Locke that's not what *we* call getting tough on crime. Tell Gary Locke that we deserve *better*." *Id.* at 252, 4 P.3d 808 (internal quotation marks omitted). We determined that the Locke advertisement was issue advocacy because it attacked his stance on an issue rather than his character. *Id.* at 270, 4 P.3d 808. Relying on *Buckley*, we stated that "in order to avoid

vagueness and a chilling effect on political speech, *Buckley* requires the definition of election-related speech to be sharply drawn." *Id.* at 266, 4 P.3d 808. We observed that the statute at issue included multiple definitions of the word "expenditure," including defining expenditure as "a payment or contribution, with no reference to a candidate." *Id.* at 282, 4 P.3d 808. As a result, we concluded that the challenged statutory provisions were unconstitutional limits on issue advocacy. *Id.*

Finally, in *McConnell*, the United States Supreme Court considered the constitutionality of the BCRA. 540 U.S. at 114, 124 S. Ct. 619. In addressing the distinction between express advocacy and issue advocacy, the Court observed that although it "seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *Id.* at 126, 124 S. Ct. 619. The Court rejected the argument that *Buckley* "drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable *First Amendment* right to engage in the latter category of speech." *Id.* at 190, 124 S. Ct. 619 (emphasis added). "That position misapprehends our prior decisions, for the express advocacy restriction was an endpoint of *statutory interpretation*, not a first principle of constitutional law." *Id.* (emphasis added). The Court further clarified that when interpreting FECA's disclosure provision in *Buckley*, the Court determined that the phrase "'for the purpose of . . . influencing'" a federal election was impermissibly vague. *Id.* at 191, 124 S. Ct. 619 (quoting *Buckley*, 424 U.S. at 77, 96 S. Ct. 612). As a result, the Court construed that section as reaching "'only funds used for communications that expressly advocate the election

or defeat of a clearly identified candidate.'" *Id.* (quoting *Buckley*, 424 U.S. at 80, 96 S. Ct. 612). The Court emphasized that "[i]n narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and overbreadth, [it] nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id.* at 192, 124 S. Ct. 619.

Independent of *Buckley*, the Court in *McConnell* also acknowledged that the First Amendment does not require a strict distinction between express advocacy and issue advocacy.

> Nor are we persuaded, independent of our precedents, that the *First Amendment* erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.

Id. at 193, 124 S. Ct. 619 (emphasis added). Instead, the Court described the distinction as "functionally meaningless." *Id.* The Court recognized that even though certain "advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election."[8] *Id.*

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[8] Recently the United States Supreme Court handed down *Federal Election Commission v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (*WRTL* II), its "most recent political speech decision." Dissent at 1192. Although the dissent discusses *WRTL* II at length, *see* dissent at 1192-93, *WRTL* II does not apply to the issue of vagueness on which this case is decided.

WRTL II involves an as-applied challenge to section 203 of

In light of *Buckley*, VEC asserts that the phrase "'in support of, or opposition to, any candidate'" in the definition of "'[p]olitical committee'" is unconstitutionally vague. Am. Br. of Appellants at 19 (quoting RCW 42.17.020(38)). However, the phrase "in support of, or opposition to, any candidate" is significantly more precise than the phrase "relative to a clearly identified candidate," which the Court determined was vague in *Buckley*. As the PDC notes,

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BCRA, 2 U.S.C. § 441b(b)(2), which prohibits corporations and unions from using general treasury funds to finance "electioneering communications." *McConnell*, in a different section than is discussed in the text above, held that section 203 was facially constitutional to the extent that the electioneering communications were express advocacy or the "functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206, 124 S. Ct. 619. Subsequently, the Court determined that, in so holding, *McConnell* did not preclude an as-applied challenge to section 203. *Wisconsin Right to Life, Inc. v. Fed. Election Comm'n*, 546 U.S. 410, 411-12, 126 S. Ct. 1016, 163 L. Ed. 2d 990 (2006) (*WRTL* I).

WRTL II addressed such an as-applied challenge. In the controlling opinion, Chief Justice Roberts, joined by Justice Alito, announced that an advertisement "is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL* II, 127 S. Ct. at 2667. Applying this test, Chief Justice Roberts determined that Wisconsin Right to Life's advertisements, extolling voters to contact their senators to urge an end to a filibuster, were not the functional equivalent of express advocacy and therefore "fle]ll outside the scope of *McConnell's* holding." *Id.* at 2670.

While *WRTL* II departs from *McConnell's* approach to express advocacy and issue advocacy, that departure is not germane to this case. The issue we address here is whether the phrase "in support of, or opposition to, any candidate" in the definition of "'political committee'" is vague. Former RCW 42.17.020(33). That analysis is unaffected by the Court's decision in *WRTL* II.

the United States Supreme Court has upheld the words "support" and "oppose" as sufficiently precise to withstand a vagueness challenge in *McConnell*.

> The words "promote," "oppose," "attack," and "support" clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision. These words "provide explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[9]

McConnell, 540 U.S. at 170 n. 64, 124 S. Ct. 619 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). Thus, we conclude that a person of ordinary intelligence would have a reasonable opportunity to understand the meaning of "in support of, or opposition

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[9] The dissent argues that *McConnell* provides no guidance here because it "refer[s] only to *party speakers*," not "private, independent speech." Dissent at 1192. But unlike the political party-specific statutes that are the primary focus of the *McConnell* decision, *see, e.g.*, 540 U.S. at 161-73, 124 S. Ct. 619 (addressing restrictions on state and local party committees), in note 64 the Court rejects a vagueness challenge to the definition of "[f]ederal election activity," 2 U.S.C. § 431(20)(A)(iii), a provision that is *not* limited to party speakers. The Court upheld as sufficiently precise to satisfy First Amendment concerns the definition of "[f]ederal election activity" to mean "a public communication that refers to a clearly identified candidate for Federal office . . . and that *promotes or supports* a candidate for that office, or *attacks or opposes* a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. § 431(20)(A)(iii) (emphasis added); *see also McConnell*, 540 U.S. at 170 n. 64, 124 S. Ct. 619. Thus, the Court's considered endorsement of the terms "supports" and "opposes" provides relevant guidance on the matter before us.

to, any candidate" in the definition of "'[p]olitical committee'" in former RCW 42.17.020(33).

VEC also argues that this court previously determined that the phrase "in support of, or in opposition to, a candidate" was unconstitutionally vague in *Bare v. Gorton*, 84 Wash.2d 380, 526 P.2d 379 (1974). However, *Bare* does not establish binding precedent here. First, we did not consider the definition of "political committee" in *Bare*.[10] In fact, we specifically noted that there was "no doubt" that the school district committee involved in that case was a "political committee." *Id.* at 382, 526 P.2d 379.

Second, the phrase "in support of, or in opposition to, a candidate," did not appear anywhere in former RCW 42.17.140 (1973), the challenged statute that we did invalidate in *Bare*. Former RCW 42.17.140 placed limitations on "expenditures made in any election campaign *in connection with* any public office." (Emphasis added.) We did observe that former RCW 42.17.140 established "limits for every election campaign for and against any ballot proposition" and wondered "what standards are to be used in determining whether a particular communication is for or against a proposition."[11] *Bare*, 84 Wash.2d at 383, 526

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[10] Nor, contrary to the dissent's claim, did the *Bare* court "construe[] identical 'support or oppose' language in election campaign statute former RCW 42.17.020 (1973)." Dissent at 1193. The definition of "'[e]lection campaign'" does include "in support of or in opposition to" language paralleling that used in the definition of "'[p]olitical committee.'" Former RCW 42.17.020(11), (22) (1973). However, the *Bare* court did not directly construe that "election campaign" definition, as evidenced by the fact that the phrase "in support of, or in opposition to" appears nowhere in the *Bare* decision.

[11] We reject the suggestion that *Bare's* use of the phrase "for or against" while discussing one factor that contributed to

P.2d 379. However, this was only one of more than six factors that we considered in determining that former RCW 42.17.140 was vague. *Id.* at 383-84, 526 P.2d 379.

Third, *Bare* concerned expenditure limits rather than disclosure requirements. As we observed, former RCW 42.17.140 was "fatally defective because it . . . operate[d] to prohibit absolutely plaintiff and others from exercising their constitutionally guarantied freedom of speech." *Id.* at 385, 526 P.2d 379. The above discussion demonstrates that *Bare* is entirely distinguishable from this case.

VEC's argument that it relied on *Bare* to determine whether the committee needed to comply with the FCPA's disclosure requirements is unpersuasive, as *Bare* did not consider the definition of "political committee" or the words "in support of, or opposition to, any candidate" and did not even concern disclosure requirements. The definition of "political committee" upon which VEC could have reasonably relied is the definition that is clear from the statutory language of former RCW 42.17.020(33). Thus, we reject VEC's argument that the PDC or this court is somehow altering the definition of "political committee" and that, if we do so, we "should do so on a purely prospective basis that would not permit the PDC to impose a fine upon the VEC." Br. in Resp. to

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former RCW 42.17.140's unconstitutional vagueness is functionally equivalent to a judicial determination that the phrase "in support of or in opposition to" is itself unconstitutionally vague. Dissent at 1193. Contrary to the dissent's assertion, a meaningful distinction can be drawn between using "for or against" while analyzing a statute that does not include "in support of or in opposition to" and analyzing "in support of or in opposition to" directly.

Br. of Amicus Curiae Campaign Legal Center (CLC) at 13.

We conclude that the words "in support of, or opposition to, any candidate" are not vague and that the definition of "'[p]olitical committee'" in former RCW 42.17.020(33) is not unconstitutionally vague. We further conclude that VEC met this definition of "political committee" when it ran the television advertisement "Better" in September 2004.[12]

"Better" began by asking "[w]ho *is* Deborah Senn looking out for?", establishing a contemporary focus for the advertisement. CP at 51; Rippie Dec. (emphasis added). "Better" then presented select quotations from 1997 newspaper articles about Senn's performance as the then-incumbent Washington State insurance commissioner.[13] *Id.* "Better" concluded "Deborah Senn Let Us Down." *Id.* When VEC ran "Better" in September 2004, Senn was no longer insurance commissioner—she was a private citizen running for the office of attorney general. VEC's review of Senn's insurance commissioner record in "Better" had contemporary significance only with respect to Senn's candidacy for attorney general.

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[12] The dissent faults our analysis of "Better," stating that it does not "point to a particular phrase . . . that is 'susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate.'" Dissent at 1192 (quoting *WRTL* II, 127 S. Ct. at 2667). However, determining whether VEC constituted a "political committee" when it ran "Better" does not involve applying the *WRTL* II standard for the functional equivalent of express advocacy that the dissent quotes. *See* note 8, *supra*.

[13] Deborah Senn was elected to the office of insurance commissioner in 1992, reelected in 1996, and served through 2000.

Nor can "Better" accurately be described as the type of advertisement that simply makes a neutral, factual assertion which could be "viewed as 'supporting'" by some, "but viewed as 'opposing'" by others, depending on the viewer's opinion of the neutral assertion. Dissent at 1191. Unlike the dissent's example of such an advertisement, one stating no more than "'Jones will cut hospital funding,'" *id.*, "Better" expressly supplied viewers with a conclusion to be drawn from the advertisement—"Deborah Senn Let Us Down." Rippie Dec. Given Senn's status—no longer incumbent insurance commissioner and currently a candidate for attorney general—the "Better" advertisement was clearly in opposition to Senn's candidacy.[14]

We hold that the PDC did not infringe on VEC's First Amendment rights by compelling VEC to register with the PDC as a political committee and to disclose information about the committee's contributions and expenditures.

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[14] Moreover, as CLC observes, VEC "is registered as a Section 527 political organization under the Internal Revenue Code." CP at 4. A section 527 "'political organization'" must be "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures . . . for . . . the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office." 26 U.S.C. § 527(e)(1)-(2). As VEC notes, the definition of "political organization" in section 527 does have a broader sweep than does the definition of "'[p]olitical committee'" in former RCW 42.17.020(33). However, VEC fails to justify how it qualifies as a "political organization" but not a "political committee." Thus, the fact that VEC registered as a "political organization" under section 527 organization is a persuasive fact that indicates that VEC was seeking the tax benefits of section 527 while disingenuously seeking to avoid the disclosure requirements of the FCPA.

2. Because former RCW 42.17.020(33) is not vague, a determination of whether VEC's advertisement constituted express advocacy or issue advocacy is unnecessary

In *McConnell*, the United States Supreme Court clarified that a determination of whether an advertisement constitutes express advocacy or issue advocacy is unnecessary if the regulation at issue is not vague. 540 U.S. at 193-94, 124 S. Ct. 619. In its oral decision denying summary judgment to VEC, the trial court observed that the United States Supreme Court's decision in *McConnell* "changed the rules of engagement on the distinction between express and issue advocacy," "overturned a significant portion of *Buckley* as relied upon by our state supreme court in *WSRP*," and "rendered a distinction between express and issue advocacy . . . 'functionally meaningless.'" CP at 425. Despite this conclusion, the trial court proceeded to hold that VEC's advertisement was a character attack on Ms. Senn that constituted express advocacy because it "was an exhortation to vote against Senn." CP at 427.

The trial court's implication that *McConnell* overturned *Buckley* and erased the distinction between express advocacy and issue advocacy does not accurately reflect the holding of *McConnell*. However, *McConnell* did clarify that the distinction between express advocacy and issue advocacy articulated in *Buckley* was not constitutionally mandated but was instead a tool of statutory construction. 540 U.S. at 191-92, 124 S. Ct. 619. We conclude that the trial court's determination that VEC's advertisement constituted express advocacy was unnecessary because former RCW 42.17.020(33) was not unconstitutionally vague. As a result, we decline to

reach the issue of whether VEC's advertisement constituted express advocacy or issue advocacy.

B. Article I, section 5 of the Washington Constitution does not provide greater protection against disclosure requirements than the First Amendment

VEC also contends that the PDC violated VEC's free speech rights under article I, section 5 of the Washington Constitution.[15] VEC argues that "article I, section 5, is more protective of election-related speech than the First Amendment, and in particular that article I, section 5, demands special scrutiny to ensure that vague regulations do not operate as prior restraints." Am. Br. of Appellants at 47. VEC also asserts that the trial court erred when it concluded that "any additional protections" provided by article I, section 5 "should be extended to the voters' right to information regarding political activity, not the right of VEC to restrict disclosure of the information." CP at 427-28.

Article I, section 5 of the Washington Constitution provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." "Unlike the First Amendment, article 1, section 5 categorically rules out prior

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[15] When presented with arguments under both the Washington and federal Constitutions, this court usually reviews the state constitutional arguments first. *State v. Reece*, 110 Wash.2d 766, 770, 757 P.2d 947 (1988). However, because federal First Amendment analysis provides an important background for reviewing regulations of political speech, we follow the organizational structure of the parties and consider the federal constitutional arguments first. *See* Am. Br. of Appellants at 12 n.6 (citing *Reece*, 110 Wash.2d at 770-71, 757 P.2d 947).

restraints on constitutionally protected speech under any circumstances."[16] *O'Day*, 109 Wash.2d at 804, 749 P.2d 142; *see also Ino Ino*, 132 Wash.2d at 117, 937 P.2d 154. As the PDC notes, "'a prior restraint is an administrative or judicial order *forbidding* communications prior to their occurrence. Simply stated, a prior restraint *prohibits* future speech, as opposed to punishing past speech.'" Am. Br. of Resp'ts at 26 n.21 (emphasis added) (quoting *Soundgarden v. Eikenberry*, 123 Wash.2d 750, 764, 871 P.2d 1050 (1994)); *see also Ino Ino*, 132 Wash.2d at 117, 937 P.2d 154.

VEC argues that article I, section 5 is violated in this case because the disclosure requirements at issue are overly vague and thereby constitute prior restraints on speech. But other than the definition of "'[p]olitical committee'" in former RCW 42.17.020(33), VEC does not challenge any provisions of the FCPA on vagueness grounds. Because we hold that former RCW 42.17.020(33) is not vague, we also necessarily conclude that the statute does not rise to the level of

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[16] When presented with a claim that a provision of the Washington Constitution provides greater protection than is provided under a provision of the United States Constitution, this court engages in a two step inquiry. First we determine whether the state provision should be given an independent interpretation from the federal provision by analyzing the six nonexclusive, neutral *Gunwall* factors. *State v. McKinney*, 148 Wash.2d 20, 26, 60 P.3d 46 (2002) (citing *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986)). Where, as here, our precedent establishes that a separate and independent analysis of a state constitutional provision is warranted, further *Gunwall* analysis is unnecessary to establish that point. If we determine that an independent analysis is warranted, we then analyze "whether the provision in question extends greater protections for the citizens of this state." *Id.*

a prior restraint as a result of vagueness. Thus, we need only determine whether the disclosure requirements at issue in this case *prohibit* future speech and, thereby, rise to the level of an unconstitutional prior restraint.

VEC fails to articulate how the FCPA's disclosure requirements *prohibited* its speech. This court has never specifically stated that compelled disclosure constitutes a prior restraint on political speech, nor have we held that article I, section 5 of the Washington Constitution provides greater protection against disclosure requirements. As noted earlier, the United States Supreme Court has recognized that compelled disclosure "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64, 96 S. Ct. 612. However, in *Buckley*, the Court determined that the disclosure requirements at issue were not a "prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82, 96 S. Ct. 612. More recently the United States Supreme Court has stated that disclosure requirements "'d[o] not prevent anyone from speaking.'" *McConnell*, 540 U.S. at 201, 124 S. Ct. 619 (alteration in original) (quoting *McConnell*, 251 F. Supp. 2d at 241).

Nor has VEC established that the disclosure requirements restricted VEC's speech before it engaged in protected speech. RCW 42.17.040 states that a political committee must file a statement of organization with the PDC "within two weeks after its organization or, within two weeks after the date when it first has the expectation of receiving contributions or making expenditures in any election

campaign, whichever is earlier." Thus, it was possible for VEC to have received contributions and made expenditures prior to registering with the PDC without violating the terms of RCW 42.17.040. Additionally, RCW 42.17.080, which governs the reporting of contributions to and expenditures from political com-mittees, requires that the political committee disclose contributions only after receiving them and expenditures only after making them. Thus, the disclosure requirements did not in any way prohibit VEC's future speech.[17] VEC has failed to prove that the disclosure requirements in this case constitute an unconstitutional prior restraint on protected speech.

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[17] The dissent engages in a lengthy discussion of the Washington Constitution's prohibition against prior restraints but fails to demonstrate that a prior restraint occurred in this case. Dissent at 1196-98. The dissent's reliance on *State v. Coe*, 101 Wash.2d 364, 679 P.2d 353 (1984), in this regard is misplaced. As the dissent notes, *Coe* does establish that "[t]he Washington Constitution 'absolutely forbids prior restraints against the publication or broadcast of constitutionally protected speech' where 'the information sought to be restrained was lawfully obtained, true, and a matter of public record.'" Dissent at 1197 (quoting *Coe*, 101 Wash.2d at 375, 679 P.2d 353). However, the dissent's assertion that "VEC's speech is clearly lawfully obtained information," "true, and a matter of public record" does not prove that therefore "restricting publication through disclosure requirements becomes a prior restraint." *Id.* at 1197. This is a faulty syllogism, akin to asserting (1) all men are mortal, (2) the cat is mortal, (3) therefore the cat is a man.

As explained above, because the FCPA registration and disclosure requirements did not impose a prior restraint on VEC's speech, the Washington Constitution's prohibition on prior restraints is inapposite.

VEC also challenges the trial court's conclusion that "any additional protections" provided by article I, section 5 "should be extended to the voters' right to information regarding political activity, not the right of VEC to restrict disclosure of the information." CP at 427-28. VEC argues that article I, section 5 is "less tolerant of vagueness in regulations of election-related speech than is the First Amendment." Am. Br. of Appellants at 39. However, as noted above, this court has previously held that article I, section 5 is only more protective if the vague regulation amounts to a prior restraint. Because VEC has not proven that the regulation amounts to a prior restraint and because we conclude that the regulation is not vague, VEC can establish no greater protection purely on vagueness grounds.

VEC also argues that "[t]here is no evidence from the State Constitutional Convention that suggests that the framers . . . contemplated regulating election-related speech" and that "at the time article I, section 5, was adopted, election-related speech was entirely unregulated in the State." Am. Br. of Appellants at 41. However, this argument does not prove that the framers or the legislature intended to protect against disclosure requirements—it proves only that history is silent on the issue.

On the other hand, the PDC argues that constitutional history and preexisting state law indicate that any additional protections found in article I, section 5 should be construed to protect the public's right to obtain information about political campaigns. The PDC identifies "at least two themes running through the history of the convention that indicate that this Court should rule on the side of the public's right to know." Am. Br. of Resp'ts at 30. The PDC

identifies these two themes as (1) the framers' concern about the power of corporations and (2) the related distrust of government and corporate influence on government. *Id.* at 30-31. As a result, the PDC states that the framers "included several provisions designed to limit the power of corporations" (*see, e.g.,*Wash. Const., art. XII) and to keep the public informed about legislative activities (*see, e.g.,* Wash. Const., art. II, §§ 19, 37). *Id.* at 31.

The PDC also asserts that preexisting law reinforces that "[t]he people of the state of Washington have a long history of protecting themselves from the exact type of secrecy VEC tried to engage in prior to the commencement of this case." Am. Br. of Resp'ts at 33. The PDC cites Initiative 276 and Initiative 134, as well as this court's decisions in *Fritz* (upholding the constitutionality of disclosure requirements of elected officials financial affairs in section 24 of Initiative 276) and *Bare* (upholding the constitutionality of campaign expenditure limits in section 14 of Initiative 276), as evidence of this commitment. Am Br. of Resp'ts at 33-34. On balance, neither constitutional history nor preexisting state law prove an intention to protect against disclosure requirements, and both prove an intention to protect citizens against powerful corporate interests. Considering all of the above, we hold that article I, section 5 of the Washington Constitution does not provide greater protection against disclosure requirements than the First Amendment.

C. Whether VEC is entitled to attorney fees and expenses

Pursuant to RAP 18.1, VEC also requests that this court award it reasonable attorney fees and expenses under 42 U.S.C. § 1988. Because we affirm the trial

court, VEC is not the prevailing party and is not entitled to attorney fees and expenses under 42 U.S.C. § 1988.

IV. CONCLUSION

We hold that the definition of "political committee" is not vague and that the FCPA's disclosure requirements did not unconstitutionally burden VEC's speech. Because we hold that former RCW 42.17.020(33) is not vague, we need not reach the issue of whether VEC's advertisement constituted express advocacy or issue advocacy. We also hold that article I, section 5 of the Washington Constitution does not provide greater protection against disclosure requirements.

The people have declared that it is the policy of the state of Washington that groups who sponsor political advertising must disclose their identities, contributions, and expenditures. Contrary to VEC's assertions, these disclosure requirements do not restrict political speech—they merely ensure that the public receives accurate information about who is doing the speaking. As Justice Brandeis famously observed, "'[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'" *Buckley*, 424 U.S. at 67, 96 S. Ct. 612 (quoting Louis D. Brandeis, Other People's Money 62 (Nat'l Home Library Found. ed. 1933)). We affirm the trial court's dismissal of VEC's constitutional claims.

WE CONCUR: GERRY L. ALEXANDER, *Chief Justice*, CHARLES W. JOHNSON, BARBARA A. MADSEN, BOBBE J. BRIDGE, TOM CHAMBERS, SUSAN OWENS, *Justices*.

J.M. JOHNSON, J. (dissenting).

Any government regulation of political speech too readily becomes censorship, which violates constitutional rights. Even disclosure requirements, if applied to political speech, must utilize a bright line test that can be clearly understood and may not be subjectively interpreted by state enforcers.[1] This constitutional requirement, critical when regulating political speech, was famously articulated in the Supreme Court's ruling that only a bright line test "'offers . . . security for free discussion.'" *Buckley v. Valeo*, 424 U.S. 1, 43, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S. Ct. 315, 89 L. Ed. 430 (1945)). The Court went on to say that any other approach "'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" *Id.*

If a government entity like the Public Disclosure Commission (PDC) has the power to regulate political speech through context analysis, the State can stifle attempts to speak truth to power. I cannot endorse government speech sentinels claiming power to divine a speaker's intent. Such regulation vitiates

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[1] Here, the Voters Education Committee (VEC) faced substantial financial penalties from its exercise of political speech, stemming from its failure to register with the government before speaking. Disclosure requirements are, at their core, content-based regulations dealing with election speech. "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (citing *Leathers v. Medlock*, 499 U.S. 439, 447, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991)).

core protections of political speech under the United States and Washington Constitutions. I respectfully dissent.

NATURE OF THE CASE

The issue presented is whether the "political committee" definition in former RCW 42.17.020(33) (2002) is vague. If vague, this court has previously ruled we must apply the United States Supreme Court's *Buckley* saving construction. If the language is not vague, as the majority argues, then the analysis must explain how an advertisement reprinting newspaper stories about performance in a different public office clearly "opposes" Ms. Deborah Senn's candidacy. Finally, any requirement that a political speaker first disclose all donors must be narrowly tailored and cannot be a prior restraint on speech.

FACTS

In August and early September 2004, the Voters Education Committee (VEC) ran a series of television advertisements consisting of newspaper headlines about Ms. Senn's actions as insurance commissioner, the position she held years before she ran for attorney general. The PDC on September 7, 2004, advised the VEC that one of these advertisements[2]

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[2] The television advertisement at issue included voice-over narration in combination with on-screen text and images of newspaper headlines.

> Text on black background: "Who is Deborah Senn looking out for?"
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> Text with image of money: "Suspended Most of $700,000 Fine *Source: Seattle Times 2/20/97*"
>
> Text with image of Insurance Commissioner's office: "In Exchange for New Staff in Her Office *Source: Seattle Times 2/20/97*"

was "malign[ing]" Ms. Senn's character. Clerk's Papers (CP) at 611. Due to this subjective designation by the PDC, actually done by staff, the VEC was labeled a "political committee" and therefore subject to the prior registration and disclosure requirements. Former RCW 42.17.020(33); *see also* CP at 611.

Text with image of Washington State Capital: "Tried to Cover Up Deal from State Legislators *Source: Seattle Times 2/20/97*"

Text with image of newspaper, *Seattle Post-Intelligencer* banner head: "'. . . easily could lead to conflict-of-interest abuses.' *2/27/97*"

Text on black background:

"Deborah Senn Let Us Down

Learn More About the Insurance Crisis

www.senninsurancecrisis.com

Paid for by Voters Education Committee."

Decl. of Vicki Rippie (Sept. 10, 2004), attach. E (videotape of KIRO TV Sept. 4, 2004, advertisement); majority at 1177-78.

The script of the voice-over narration read:

Who is Deborah Senn looking out for?

As Insurance Commissioner, Senn suspended most of a $700,000 fine against an insurance company . . . in exchange for the company's agreement to pay for four new staff members in Senn's own office.

Senn even tried to cover up the deal from State Legislators.

The *Seattle Post Intelligencer* said Senn's actions "easily could lead to conflict-of-interest abuses."

Deborah Senn let us down . . . log on to learn more.

Paid for by Voters Education Committee."

Clerk's Papers (CP) at 51; majority at 1177-78.

Former RCW 42.17.020(33) defines a "political committee" in relevant part "as any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or in opposition to, any candidate or any ballot proposition" (hereafter the last phrase is referred to as the "support or oppose" test). In order to comply with this new designation by the PDC, the VEC ultimately filed a disclosure form. The form indicated a single contribution from the national office of the United States Chamber of Commerce.

The VEC brought the instant action against the PDC, arguing that this regulation of its Senn advertisements and possible imposition of financial penalties are impermissible under article I, section 5 of the Washington Constitution and the First Amendment to the United States Constitution. Specifically, the VEC correctly asserts (1) that the statute which defines "political committee" for PDC registration and disclosure purposes is vague if applied without a saving construction; (2) that the superior court did not apply the express candidate advocacy/issue advocacy saving construction found in prior decisions of this court and the United States Supreme Court in *Buckley*; (3) that the PDC requirement of registration and disclosure before publication of ads, recounting newspaper stories of Ms. Senn's performance in a prior office, amount to a prior restraint of their speech; and (4) that they are entitled to attorney fees.

STANDARD OF REVIEW

This court reviews motions for summary judgment de novo. *Berrocal v. Fernandez*, 155 Wash.2d 585, 590, 121 P.3d 82 (2005). Further, this court reviews any content based speech restriction under strict

scrutiny. Where a statute regulates protected speech, we view it with suspicion. "Content-based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny." *Collier v. City of Tacoma*, 121 Wash.2d 737, 748-49, 854 P.2d 1046 (1993) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)).

ANALYSIS

1. *The Statute is Facially Vague without the Saving Construction*

We begin our analysis with the language of the political committee definition statute. *See* former RCW 42.17.020(33). This is the central issue. If the statutory language is vague, we are bound to apply the aforementioned *Buckley* saving construction. Any finding that the language in the statute is imprecise, supports the VEC's arguments. The purpose of the vagueness doctrine is twofold: "'first, to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement.'" *State v. Williams*, 144 Wash.2d 197, 203, 26 P.3d 890 (2001) (quoting *State v. Halstien*, 122 Wash.2d 109, 116-17, 857 P.2d 270 (1993)).

Here, the VEC convincingly argues that the average citizen has no way of knowing what conduct is prohibited by the statute. Naturally, each person's perception of what constitutes "opposing or supporting" a candidate will differ based on each person's subjective impressions. For example, if an advertisement states "Jones will cut hospital funding," the statement will be viewed as "supporting" by those who think funding should be

cut but viewed as "opposing" by those who think slashing funding is wrong.

Conversely, the majority accepts the PDC's call for a malleable definition of "support or oppose." The PDC argues that "any bright line test is unworkable . . . especially in the area of campaign ads." Am. Br. of Resp'ts (PDC) at 22. It also asserts that "exacting precision is not required in order for a person to understand what is prohibited." *Id.* at 19. The PDC continues to embrace a hazy standard by stating that speech regulation "is not impermissibly vague just because it may be imprecise." *Id.* I disagree with the PDC's argument because it is in conflict with United States Supreme Court precedent and decisions of this court.

Freedom of speech is a bedrock principle of American constitutional jurisprudence founded in the First Amendment of the Bill of Rights (and our own constitution's article I, section 5). Any government regulation proposing speech restrictions must be clear: "*[p]recision of regulation* must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (emphasis added); *see also O'Day v. King County*, 109 Wash.2d 796, 810, 749 P.2d 142 (1988) ("The Supreme Court has repeatedly emphasized that where First Amendment freedoms are at stake a *greater degree of specificity* and clarity of purpose is essential." (emphasis added)).

This heightened level of specificity and clarity is required by the First Amendment and directly rebuts the PDC's broad assessment of its powers. Any limitations on political speech (even disclosure requirements) are disfavored. *Id.* Instead, we require a narrow and precise statute before allowing any

government regulation. This court in *Washington State Republican Party v. Washington State Public Disclosure Commission*, 141 Wash.2d 245, 266, 4 P.3d 808 (2000) (*WSRP*) held that "in order to avoid vagueness and a chilling effect on political speech, *Buckley* requires the definition of election-related speech to be sharply drawn." In light of this instruction, we examine Washington's statutory definition of a "political committee."

The relevant statute's "support or oppose" language is not "sharply drawn." *See* former RCW 42.17.020(33). Punitive laws, including disclosure requirements for political committees, must not be so vague that people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). In other words, any right-minded person must be able to easily determine whether the "support or oppose" statutory restrictions apply. *See id.* This is because vagueness alone has a chilling effect on speech, intimidating some from exercising their constitutional rights. Contrary to the suggestion of the majority, if this statute encourages subjective enforcement, it should be held void for vagueness.

The majority asserts that *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), upheld similar statutory language ("support" and "oppose") as sufficiently precise. Majority at 1184 (arguing that "support or oppose" is "significantly more precise than the phrase 'relative to a clearly identified candidate,' which the Court determined was vague in *Buckley*."). The majority cites *McConnell* to support its position, where the United States Supreme Court actually stated:

> The words "promote," "oppose," "attack," and "support" clearly set forth the confines within which *potential party speakers* must act in order to avoid triggering the provision. These words "provide explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."

540 U.S. at 170 n. 64, 124 S. Ct. 619 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (emphasis added)).

However, the majority confuses (political) *party* speakers with *private* speakers. This distinction makes all the difference. *McConnell* was referring only to *party speakers* (such as political party operatives), and not referring to the private, independent speech at issue here. Candidates and the political parties who support them for public office may be subject to broader regulation in the interests of disclosure. By definition, they are in the business of supporting and opposing political campaigns. They are expected to know what actions "support or oppose" candidates and indeed design their ads solely for that purpose. Applying the same test to *private speakers* who wish to exercise their right to engage in only pure political speech, is unconstitutional. *See WSRP*, 141 Wash.2d at 266, 4 P.3d 808 (requiring sharply drawn regulation of political speech).

The United States Supreme Court's most recent political speech decision dealt with an organization similar to VEC, *Federal Election Commission v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (*WRTL* II), featuring an as-applied challenge. I disagree with the majority's assertion that *WRTL* II is not germane. Clearly, we

must follow the most recent pronouncement of the Court when reading the "support or oppose" language in former RCW 42.17.020(33). If VEC "supported or opposed" Ms. Senn, then it is a political committee under the statute. If not, VEC has been censored by the PDC. The precise issue in this case is whether "support or oppose" is overbroad or whether it can be saved by using a narrow, express advocacy construction. In *WRTL* II, the Supreme Court emphasized that:

> (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of 'contextual' factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech.

Id. at 2669 n.7. Thus, any determination of whether VEC is a "political committee" must be "objective, focusing on the substance of the communication," which in this case requires a rigorous, objective inquiry into the precise language used in the advertisements concerning Ms. Senn. *Id.* at 2666; *see also* former RCW 42.17.020(33). This has not been done. The majority cannot point to a particular phrase in the disputed advertisements that is "susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate." *WRTL* II, 127 S. Ct. at 2667. In fact, the majority can reach its conclusion only if it assumes contextual or timing factors that are disfavored by *WRTL* II.

Adapting Chief Justice Roberts' words, I would hold, "Enough is enough. Issue ads like WRTL's [or VEC's] are by no means equivalent to contributions,

and the *quid-pro-quo* corruption interest cannot justify regulating them. To equate WRTL's [or VEC's] ads with contributions is to ignore their value as political speech." *Id.* at 2672.

The majority's acceptance of a vague definition would allow the PDC a tremendous amount of discretionary power over private political speech. Under this scheme, this government censor would determine the parameters of the "support or oppose" statutory language, often *after the speech* has taken place (when the speaker is already in violation). Speakers will be held hostage to impermissible postspeech agency decisions. *See id.* at 265, 4 P.3d 808 (recognizing the danger of speech regulation by a state agency). The majority's approach denies all speakers the constitutional right to craft a message that is educational, including criticism of a candidate, but not subject to disclosure requirements.[3]

A. This Court Has Previously Interpreted "Support or Oppose" Language as Vague

Today's decision disregards other direct precedent. In *Bare v. Gorton*, 84 Wash.2d 380, 383-87, 526 P.2d 379 (1974), this court labeled the "support or oppose"

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[3] Any determination that speech is "opposing" a particular candidate is flawed unless it considers the actual language in the advertisement. The majority did not perform this analysis. This court recognized the difference between analyzing actionable speech and conclusory labeling in *Suggs*. "Labeling certain types of speech 'unprotected' is easy. Determining whether specific instances of speech actually fall within 'unprotected' areas of speech is much more difficult." *In re Marriage of Suggs*, 152 Wash.2d 74, 82, 93 P.3d 161 (2004). Here, the majority shirked the task of struggling with the actual wording in the VEC advertisement. Instead, it made the blanket determination that the words were actionable per se.

statutory language as too vague. The *Bare* court considered the constitutionality of spending limits imposed by the Fair Campaign Practices Act on "election campaign" expenditures. *Id.* An "election campaign" was defined as "any campaign *in support of or in opposition to a candidate* for election to public office. . . ." Laws of 1973, ch. 1, § 2 (Initiative No. 276, § 2(11)) (codified as RCW 42.17.020(18) (emphasis added)). This court properly identified the vagueness inherent in the statutory language:

> [W]ho decides and what standards are to be used in determining whether a particular communication is for or against a proposition? Imagine an avdertisement [sic] which states "If you believe you should raise your taxes for a teacher salary increase, vote for the special levy." *The act provides no standards to determine how to allocate the cost of that message as for or against the proposition.*

Bare, 84 Wash.2d at 383, 526 P.2d 379 (emphasis added).

The majority attempts to differentiate *Bare* because the case did not specifically consider the definition of a "political committee" but instead dealt with campaign expenditures. Majority at 1184. However, this is not a distinction that makes a difference. *Buckley* and *McConnell* are admittedly relevant to the election speech debate even though these cases are primarily about campaign finance. The underlying principles are like *Bare*, where this court considered similar, unclear language as applied to expenditures in an election campaign. *See Bare*, 84 Wash.2d at 383-87, 526 P.2d 379 (construing identical "support or oppose" language in election campaign statute former RCW 42.17.020 (1973)). Thus,

the inherent vagueness of the definition is the only relevant inquiry.

Next, the majority endeavors to distinguish *Bare* by splitting a grammatical hair. It asserts that the "support or oppose" language in the VEC's complaint is functionally different from the "for or against" wording in *Bare*. Majority at 1185. There is no meaningful distinction between the two phrases, either in application or definition. Without question, *Bare* was construing the limits of "election campaign" expenditures that statutorily include the vague in support of or in opposition to language. The court in *Bare* clearly disapproved of regulating speech language "for or against" a proposition if standards were not provided to guide the speaker. *See Bare*, 84 Wash.2d at 383-87, 526 P.2d 379. In the instant case, no standards were provided to the VEC.

As if confirming the reasoning in *Bare*, the Washington State Legislature in 2005 replaced the unconstitutionally vague former RCW 42.17.020(33) with a new definition.[4] This latest version of the law regulates all "electioneering communications" within a certain time frame before elections. RCW 42.17.020(20).[5] The legislature's solution was an

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[4] *C.f., Wisconsin Right to Life*, discussed supra.

[5] The new statute, RCW 42.17.020(20), states that regulated electioneering communications include:

> [A]ny broadcast, cable, or satellite television or radio transmission . . . that:
>
> (a) Clearly identifies a candidate for a state, local, or judicial office either by specifically naming the candidate, or identifying the candidate without using the candidate's name;
>
> (b) Is broadcast, transmitted, mailed, erected, distributed, or otherwise published *within sixty days*

attempt to cure the vagueness of the prior version that we deal with today. The 2005 legislature attempted to cure the deficient language by echoing the federal definition of "electioneering communication" and its accompanying timeline. *See* 2 U.S.C. § 434(f)(3).

Clearly, we must judge the VEC's advertisement here based on controlling law at the time of the speech. The VEC spoke under the previous version of the statute and relied on the explicit words test that we articulated in *WSRP*. *See* 141 Wash.2d at 259, 4 P.3d 808. The "support or oppose" definition was acceptable only if the saving construction from *WSRP* is applied. The definition is too vague if relying on the contextual definition applied by the PDC. *See WSRP*, 141 Wash.2d at 268-69, 4 P.3d 808 (a context approach "invites too much in the way of regulatory and judicial assessment of the meaning of political speech . . . *Furgatch's* context approach simply adds another layer of uncertainty, and is too flexible to be consistent with *Buckley*." (citations omitted)).[6]

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before any election for that office in the jurisdiction in which the candidate is seeking election; and

(c) Either alone, or in combination with one or more communications identifying the candidate by the same sponsor *during the sixty days before an election,* has a fair market value of five thousand dollars or more.

(Emphasis added.) This newest legislation has not yet been subject to court scrutiny.

[6] *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (context analysis that "must, *when read as a whole, and with limited reference to external events*, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate" (emphasis added)).

The majority's refusal to consistently apply *WSRP* gives too much deference to government regulators. Speaker VEC correctly argues that this field of prohibited speech will ultimately be determined on a case by case basis as the PDC decides to sanction unwary speakers for uttering words the agency disapproves. Am. Br. of Appellants (VEC) at 5. The PDC conclusion that the ads "malign" Ms. Senn is symptomatic, indicating PDC's disfavor of these ads. This court has recognized that bestowing such power on a state agency is fraught with peril for free speech:

> This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential "evil" to be tamed, muzzled or sterilized.

WSRP, 141 Wash.2d at 265, 4 P.3d 808 (quoting Fed. *Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 54-55 (2d Cir. 1980) (Kaufman, J., concurring)).

This reasoning surely applies to the PDC, an executive agency appointed by the governor claiming power to regulate the sensitive area of political speech. The PDC's actions here are *precisely* the type considered by this prescient warning. The majority would give wide power to an agency regulating First Amendment expression (the same agency defendant in *WSRP*). *See id.*

Following the majority's reasoning, the PDC would register or regulate every grass roots organization speaking in "support of or opposition to" any political issue as a "political committee." If one wants to urge

neighbors to donate money in support of or opposition to a candidate or issue, one must first form a political committee and register with the PDC under the threat of financial penalty.[7]

This PDC-managed restriction obviously favors large interests. If an issue detrimental to a citizen's group arises close to an election, it would be difficult to quickly advertise without incurring the wrath of the PDC. It takes time to comply with the regulations and forms necessary to form a political committee, and even more time to raise sufficient funds in the small amounts typical of neighborhood groups. The PDC's broad, overinclusive definition of a political committee will shut out newcomers and minority voices from the political process.[8]

2. *Saving Construction*

A vague political speech statute is unconstitutional unless saved by a bright line statutory construction. *WSRP*, 141 Wash.2d at 266, 4 P.3d 808. This holding has never been overruled, and the majority does not do so. While the majority does not expressly reach the issue, I perform the following analysis because I find the statute to be facially vague. The majority's

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[7] Recently, there was a hastily scheduled advisory election regarding highway construction through Seattle. *See* Bob Young, *Political Campaign Heats Up Over Viaduct*, Seattle Times, Feb. 13, 2007 (concerning the Alaskan Way Viaduct referendum vote on March 13, 2007). Do low budget citizen advocacy groups have to go through the process to register with the PDC before speaking? Only the PDC knows for sure. It is clear that citizen's groups will be at a significant disadvantage to groups which have already registered as "political committees."

[8] PDC enforcement action, or its threat, serves as a separate deterrent to speech.

opinion acknowledges the United States Supreme Court's *Buckley* rule and then dismisses it, based on the later statement in *McConnell* that the line between express and issue advocacy in congressional campaigns is "functionally meaningless." 540 U.S. at 193, 124 S. Ct. 619; *see also* majority at 1186.

The United States Supreme Court noted that this line had been drawn as a matter of statutory saving construction. After extensive hearings, Congress had subsequently adopted a new definition. *Id.* However, this argument does not undermine VEC's claim. The test need not be a "first principle of constitutional law" to have continuing viability. *McConnell*, 540 U.S. at 190, 124 S. Ct. 619; *see also id.* at 192 n.75, 124 S. Ct. 619 ("[o]ur adoption of a narrowing construction [in *Buckley*] was consistent with our vagueness and overbreadth doctrines."). The *Buckley* test remains a legitimate tool of statutory construction to save an arguably vague statute.

A. Courts Continue To Affirm Buckley

Federal courts continue to affirm that *Buckley's* express advocacy construction is appropriate to save otherwise unconstitutionally vague regulations of political speech. *Anderson v. Spear*, 356 F.3d 651, 665 (6th Cir.) (invalidating a statute that prohibited certain electioneering activity "for or against any candidate" because it was unconstitutionally vague) *cert. denied*, 543 U.S. 956 (2004). The United States Court of Appeals for the Sixth Circuit stated in relevant part:

> [W]hile the *McConnell* Court disavowed the theory that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy," *it nonetheless left intact the*

> *ability of courts to make distinctions between express advocacy and issue advocacy,* where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest.

Id. at 664-65 (emphasis added) (quoting *McConnell*, 540 U.S. at 193, 124 S. Ct. 619); *see also ACLU of Nev. v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) (affirming the continued viability of *Buckley* as a saving construction).

Likewise, in *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006), the United States Court of Appeals for the Fifth Circuit used the *Buckley* standard to construe a statute that regulated campaign expenditures "supporting" or "opposing" candidates. ("*McConnell* does not obviate the applicability of *Buckley's* line-drawing exercise where, as in this case, we are confronted with a vague statute."). *Id.* In *Freedom*, the flaw in the campaign finance act was that the statute *might* be read to regulate issue advocacy. *Id.* at 665. Following *McConnell*, the court held that regulating such issue communications is not *per se* unconstitutional, but it rendered the scope of the statute as too vague. *Id.*

Similarly, the federal circuit court sharply criticized the broad application of *McConnell* beyond the specific congressional record in that case. The *Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006) decision was upheld by the Supreme Court. The exemption to *McConnell* is relatively clear; if the ad lacks explicit words of "support or opposition" to the candidate and the ad makes no explicit reference to the election, these factors favor an exemption. *Id.*

That court went on to distinguish *McConnell* because *McConnell* dealt primarily with a voluminous record of sham "issue" advertisements in congressional campaigns and is only relevant when dealing with express advocacy or its functional equivalent. *See, e.g., WRTL* II. Here, the as-applied challenge required the court to look at the language (*not* the intent or timing) of this specific advertisement.

B. This Court's Precedent Properly Incorporates the Buckley Test

This court considered the approach that the PDC now advocates and explicitly rejected it, concluding that "the context approach departs from the bright-line express advocacy test of *Buckley*." *WSRP*, 141 Wash.2d at 269, 4 P.3d 808. The VEC depended on this court's holding when it published these ads. Under this court's decision, only specific language triggers the specter of prior government regulation. *Id.* Today's majority opinion substitutes a new standard for this previously well-considered protection.

Any speaker in Washington State should be able to rely on this court's precedent in exercising constitutional rights. If we approve any changing standard from that of *WSRP*, which was the controlling law at the time of VEC's advertisement, we are guilty of chilling speech. In the future, speakers will fear that they cannot rely on this court's decisions and that future state enforcement may be determined and applied retroactively to political speech once considered safe.

3. *Washington State Constitution*

Constitutional protection of individual political speech is paramount under the Washington

Constitution, no matter how slight the government intrusion. Registration and disclosure requirements on political speech are, by definition, content based restrictions that are subject to a strict scrutiny review. *See Collier*, 121 Wash.2d at 748-49, 854 P.2d 1046. Strict scrutiny requires a statute be narrowly tailored to serve a compelling state interest. This presumption against any regulation of political speech is vitally important. Contrast the PDC's increasingly complex web of speech regulation (changing rules, forms, opinions, etc.) against the relatively simple constitutional admonition (which applies to states): "Congress shall make *no law* . . . abridging the freedom of speech. . . ." U.S. Const. amend. I (emphasis added).

The Washington State Constitution explicitly provides more protection to speech than the federal constitution. *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 116-17, 937 P.2d 154, 943 P.2d 1358 (1997). Article I, section 5 of the Washington Constitution provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Establishing protection under some sections of the Washington State Constitution often involve a *Gunwall* analysis[9] to show the protection differs from that of the United States Constitution. However, no such analysis is necessary here because the relevant broader protection for speech has already been established by this court.[10] *See State v. Vrieling*, 144 Wash.2d 489, 495, 28 P.3d 762 (2001).

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[9] *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

[10] E.g., this court has repeatedly held that any broad regulation that rises to the level of a prior restraint is prohibited. *See Ino Ino*, 132 Wash.2d at 116-17, 937 P.2d 154.

Unlike its federal counterpart, article I, section 5 strictly prohibits prior restraints on free speech. *Ino Ino*, 132 Wash.2d at 119, 937 P.2d 154. This includes prohibition of any requirement of prior registration to engage in speech. *See id.* In regard to claims of overbreadth and vagueness, the text of article I, section 5 is *less tolerant* than the First Amendment of overbroad restrictions on expression when such restrictions rise to the level of a prior restraint. *O'Day v. King County*, 109 Wash.2d 796, 804, 749 P.2d 142 (1988).

The Washington Constitution "absolutely forbids prior restraints against the publication or broadcast of constitutionally protected speech" where "the information sought to be restrained was lawfully obtained, true, and a matter of public record." *State v. Coe*, 101 Wash.2d 364, 375, 679 P.2d 353 (1984). In the present case, VEC's speech is clearly lawfully obtained information, it was true, and a matter of public record (it was an amalgam of public record newspaper articles). Majority at 1177-78. Thus, restricting publication through disclosure requirements becomes a prior restraint. Another indication that this vague statute operates as a prior restraint is the evidence that the speaker had no clear test to determine this particular speech required prior registration. *See Coe*, 101 Wash.2d at 375, 679 P.2d 353.

In order to survive strict scrutiny, the majority must show the regulation satisfies a compelling state interest and is narrowly tailored. The majority argues that the government has an important interest in ferreting out corruption and influence peddling within the political process. *See State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wash.2d

503, 508, 546 P.2d 75 (1976). The majority also contends that these interests are "'sufficiently important to outweigh the possibility of infringement.'" Majority at 1181 (quoting *Buckley*, 424 U.S. at 66, 96 S.Ct. 612). Distressingly, there is no evidence to support the claim that this private speech triggered any compelling state interest. There is no suggestion of corruption or influence peddling.

In contrast with the majority, I also disagree that disclosure requirements are automatically the least restrictive alternative. *See* majority at 1181. In some cases, even anonymous political speech may be a necessary shield to protect private speakers. Anonymity sometimes protects unpopular individuals and voices from retaliation and suppression by an intolerant majority.[11] Allowing robust anonymous speech in the political arena, encourages writers to freely express ideas without fear of retaliation.[12]

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[11] Four decisions of the Supreme Court hold or strongly imply that the ability to speak anonymously—and thus with less concern for repercussions—is part of the "freedom of speech" protected by the First Amendment against governmental interference. *Talley v. California*, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002). *See* Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, Cato Sup.Ct. Rev. 57 (2001-02).

[12] Anonymous speech also ensures that ideas will be judged on their merits: "[W]e must consider the possibility that anonymity promotes a focus on the strength of the argument rather than the identity of the speaker; this is a reason why Madison, Hamilton, and Jay chose to publish *The Federalist* anonymously. Instead of having to persuade New Yorkers that his

Unfortunately, the majority's ruling ensures that critics of popular candidates cannot use this method of expression, and disclosure requirements will temper any advocacy of unpopular opinions.

Conversely, the majority argues that disclosure requirements imposed in this case ultimately allow the speech to continue and are therefore a narrowly tailored imposition on the VEC's constitutional right to free speech.[13] *See* majority at 1187. This analysis misses the crux of the issue. *Buckley* held that disclosure requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment" and that such requirements are subject to "exacting scrutiny." 424 U.S. at 64, 96 S. Ct. 612.

In short, any speaker must know beforehand which speech is regulated, regardless of the penalty. Here, a speaker could choose many words which *might* run afoul of the "support or oppose" regulation as construed by the PDC. We should not let a government

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roots in Virginia should be overlooked, Madison could present the arguments and let the reader evaluate them on merit." *Majors v. Abell*, 361 F.3d 349, 357 (7th Cir. 2004) (Easterbrook, J., dubitante).

[13] The majority misconstrues the right of the public to receive information *through* government regulation with the right of the public to receive information *unhindered by* excessive government regulation. *See Fritz v. Gorton*, 83 Wash.2d 275, 296, 517 P.2d 911 (1974). In that case, the court held that more information about the candidates themselves is desirable because it allows voters to make an informed decision. *See id.* Notably, this process is best accomplished by robust criticism of political candidates, similar to the VEC's speech in the instant case. *Id.* ("factors that may influence the electorate's evaluative processes are not always disclosed in the heat of a campaign and less often when the official has taken office."). *See* majority at 1180-81.

censor or subjectively decide which speech is penalized and which is not.

4. *Attorney Fees*

Pursuant to RAP 18.1, we should grant the VEC's request that the court award it reasonable attorney fees and expenses under 42 U.S.C. § 1988.

CONCLUSION

The majority opinion leaves troubling questions about what governmental regulation of political speech the majority finds constitutionally permissible. If VEC had quoted the newspaper articles verbatim rather than voice over the headlines, must it register before speaking? Answer: Ask the PDC. What if VEC had copied and distributed entire newspaper articles, must it register before speaking? Answer: Ask the PDC. This is the wrong answer under both the United States and Washington Constitutions. A speaker need not ask a government agency—or register with the government—before engaging in political speech. Under the majority decision, it is not clear where constitutionally protected criticism ends and the PDC's regulatory power begins. The protections of the First Amendment, and of our Washington Constitution article I, section 5, are violated. Thus, I respectfully dissent.

I CONCUR: RICHARD B. SANDERS, *Justice.*

APPENDIX B

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

[Filed Sept. 8, 2005]

NO. 04-2-23551-1SEA

STATE OF WASHINGTON, *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,
Plaintiff,

v.

VOTERS EDUCATION COMMITTEE,
a political committee,
Defendant.

VOTERS EDUCATION COMMITTEE, a Washington nonprofit corporation; BRUCE BORAM, an individual; and VALERIE HUNTSBERRY, an individual,
Plaintiffs,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION; MICHAEL CONNELLY, JEANETTE WOOD, FRANCIS MARTIN, EARL TILLY, and JANE NOLAND, Commissioners of the Washington State Public Disclosure Commission in their individual capacities; VICKI RIPPIE, Executive Director of the Washington State Public Disclosure Commission in her individual capacity, and CHRISTINE GREGOIRE, Attorney General of the State of Washington in her individual capacity,
Defendants,

and

DEBORAH SENN,

Intervenor.

ORDER ON SUMMARY JUDGMENT

THIS MATTER having come on regularly for hearing on August 12, 2005 before the undersigned Judge of the above-entitled Court on the State's Motion for Partial Summary Judgment, and the STATE OF WASHINGTON PUBLIC DISCLOSURE COMMISSION ("PDC") et al., appearing through their counsel, ROB McKENNA, Attorney General and LINDA A. DALTON, Senior Assistant Attorney General and the VOTERS EDUCATION COMMITTEE ("VEC"), et al., appearing through their counsel, JOHN J. WHITE, JR. and KEVIN B. HANSEN, Attorneys at Law, and DEBORAH SENN, appearing through her counsel, MICHAEL E. WITHEY, and the court having considered the entire file in the above entitled cases including all pleadings filed in support or opposition to the summary judgment pleadings filed herein, and the Court having heard and considered the argument of the parties to these actions and having issued an oral opinion, concluding that the Voters Education Committee's political advertisements about Deborah Senn constituted reporting activities under the state campaign finance laws, a copy of which is attached to this Order, the Court hereby orders as follows:

1. The State's Motion for Partial Summary Judgment filed in case number 04-2-33247-8SEA is granted.

2. The Voters Education Committee's Motion for Summary Judgment filed in case number 04-2-23551-1SEA is denied.

3. The Voters Education Committee case filed under case number 04-2-23551-1SEA is hereby dismissed in its entirety including all causes of action.

4. The Intervenor's Motion to Compel filed on February 9, 2005 is denied.

5. The costs and disbursements, if any, shall be awarded to the State by separate order.

DONE IN OPEN COURT this 31st day of August, 2005.

/s/ Richard Jones
HONORABLE RICHARD JONES

Presented by:

ROB McKENNA
Attorney General

/s/ Linda A. Dalton
LINDA A. DALTON, WSBA #15467
Senior Assistant Attorney General
Attorney for State of Washington,
Public Disclosure Commission, et al.

Approved as to form;
Notice of Presentation Waived:

/s/ John J. White, Jr.,
JOHN J. WHITE, JR., WSBA #13682
Attorney for Voters Education Committee,
Bruce Boram and Valerie Huntsberry

Approved as to Form;
Notice of Presentation Waived:

/s/ Michael E. Withey
MICHAEL E. WITHEY, WSBA #4787
Attorney for Intervenor Deborah Senn

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON IN AND FOR
THE COUNTY OF KING

CASE NO. 04-2-23351-1 SEA
04-2-03247-8 SEA

VOTERS EDUCATION COMMITTEE, *et al.*,
Plaintiffs,

vs.

PUBLIC DISCLOSURE COMMISSION, *et al.*,
Defendants.

VERBATIM REPORT OF PROCEEDINGS

HEARD BEFORE THE
HONORABLE RICHARD A. JONES

AUGUST 12, 2005

APPEARANCES:

JOHN WHITE, ATTORNEY-AT-LAW, APPEARING ON BEHALF OF THE PLAINTIFFS;

LINDA DALTON, ATTORNEY-AT-LAW, APPEARING ON BEHALF OF THE DEFENDANTS;

MICHAEL E. WITHEY, ATTORNEY-AT-LAW, APPEARING ON BEHALF OF THE INTERVENOR;

WHEREUPON THE FOLLOWING PROCEEDINGS WERE HAD AND DONE,

THE COURT: GOOD MORNING, AGAIN. PLEASE BE SEATED.

FIRST OF ALL I WANTED TO THANK ALL OF THE COUNSEL IN THIS CASE FOR THE ADVOCACY AND THE MANNER IN WHICH YOU REPRESENTED YOUR CLIENTS AND THE LEVEL OF DETAIL THAT YOU PROVIDED TO THE COURT. THE BRIEFING AND MATERIALS SUBMITTED WERE VERY INSTRUMENTAL AND HELPFUL TO THE COURT IN REACHING THE DETERMINATION THAT I HAVE MADE. I ALSO DEEPLY APPRECIATE THE MANNER IN WHICH YOU RELATED TO EACH OTHER, AS WELL, COUNSEL.

THE FOLLOWING RULING APPLIES TO BOTH MOTIONS FOR SUMMARY JUDGMENT AND THE TWO CAUSES OF ACTION.

AT THE OUTSET THIS COURT CONCLUDES THAT THE FOCUS OF THESE MOTIONS PERTAINED TO TWO TELEVISION ADVERTISEMENTS CONCERNING FORMER INSURANCE COMMISSIONER DEBORAH SENN. AT THE TIME OF THESE ADS MS. SENN WAS A CANDIDATE FOR ATTORNEY GENERAL. THE STATEMENTS IN THE ADS INCLUDE REFERENCES TO PRESS COVERAGE OF MS. SENN AS INSURANCE COMMISSIONER. THERE IS NO FACT DISPUTE REGARDING THE CONTENT OF THE ADVERTISEMENT. HENCE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT, AND THE SOLE DETERMINATION CONCERNS STATUTORY CONSTRUCTION. SUCH CONSTRUCTION IS A QUESTION OF LAW THAT MAY BE RESOLVED BY THE COURT AT THIS TIME.

MS. SENN'S COUNSEL HAS CONCEDED DURING ARGUMENT THAT THERE IS NO CR 56 MOTION OUTSTANDING, AND THAT THIS MATTER IS RIPE FOR RESOLUTION, DESPITE THE REPRESENTATIONS IN HIS BRIEFING.

THE ISSUES BEFORE THIS COURT ARE WHETHER THE VEC HAD A DUTY TO REGISTER AS A POLITICAL COMMITTEE AND FILE REPORTS TO DISCLOSE TO THE PUBLIC INFORMATION REQUIRED BY STATUTE.

IN REACHING ITS CONCLUSIONS THIS COURT WISHES TO MAKE A FORMAL RECORD OF ITS ANALYSIS OF THE APPLICABLE AND CONTROLLING LEGAL AUTHORITIES.

THERE IS NO DISPUTE THAT BUCKLEY VS. VALEO WAS CONTROLLING AUTHORITY AT THE FEDERAL LEVEL ON POLITICAL SPEECH PRIOR TO 2003. BUCKLEY CLEARLY PROVIDED A DISTINCTION FOR PURPOSES OF CAMPAIGN FINANCING BETWEEN ADVOCACY THAT WAS EXPRESS—THAT IS, ADVOCATED FOR THE ELECTION OR DEFEAT OF THE CANDIDATE AND THAT RELATED SOLELY TO ISSUE STATEMENTS. THE SUPREME COURT CLEARLY CONCLUDED IN BUCKLEY THAT THE MANDATORY DISCLOSURE REQUIREMENTS OF THE FEDERAL CAMPAIGN LAWS APPLIED ONLY TO EXPRESS ADVOCACY FOR THE ELECTION OR DEFEAT OF A CLEARLY IDENTIFIED CANDIDATE FOR FEDERAL OFFICE.

THE COURT IN BUCKLEY ATTEMPTED TO CLARIFY EXPRESS ADVOCACY BY GIVING EXAMPLES OF LANGUAGE AND TERMS THAT HAVE SINCE BECOME KNOWN AS THE "MAGIC

WORDS." OUR OWN STATE SUPREME COURT HAS FURTHER DEFINED EXPRESS ADVOCACY IN THE WASHINGTON STATE REPUBLICAN PARTY DECISION, WSRP, HEREINAFTER TO INCLUDE STATEMENTS THAT EXHORT A LISTENER TO VOTE EITHER FOR OR AGAINST A PARTICULAR CANDIDATE. THE BUCKLEY AND WASHINGTON STATE REPUBLICAN PARTY DECISIONS MAKE IT CLEAR THAT SPEECH THAT LACKS A SPECIFIC EXHORTATION TO VOTE IN A PARTICULAR WAY IS TO BE IDENTIFIED AS ISSUE ADVOCACY AND BEYOND THE REACH OF GOVERNMENT REGULATION AND FULLY PROTECTED AS POLITICAL SPEECH UNDER THE FIRST AMENDMENT.

IN 2003 IN MCCONNELL, THE UNITED STATES SUPREME COURT'S MOST RECENT ANALYSIS OF THESE STATUTES CHANGED THE RULES OF ENGAGEMENT ON THE DISTINCTION BETWEEN EXPRESS AND ISSUE ADVOCACY. IN THIS COURT'S ANALYSIS THE UNITED STATES SUPREME COURT IN MCCONNELL OVERTURNED A SIGNIFICANT PORTION OF BUCKLEY AS RELIED UPON BY OUR STATE SUPREME COURT IN WSRP, AND RENDERED A DISTINCTION BETWEEN EXPRESS AND ISSUE ADVOCACY AS THE DECISION INDICATED, "FUNCTIONALLY MEANINGLESS." THE SO-CALLED "MAGIC WORDS" NO LONGER CONTROLLED IN THE ANALYSIS.

CONSEQUENTLY IN THIS COURT'S ANALYSIS THE DISTINCTION BETWEEN EXPRESS OR ISSUE ADVOCACY IS NO LONGER THE CONTROLLING LAW. WHILE THE COURT IS

SATISFIED THAT THIS IS A CORRECT CONCLUSION, THERE ARE NONETHELESS CASES AND DECISIONS CONTINUING TO ANALYZE EXPRESS VERSUS ISSUE ADVOCACY, AS HAD BEEN DONE PRIOR TO 2003, ANDERSON VS. SPEARS, TO NAME ONE.

EVEN IF THIS COURT WERE TO CONCLUDE THE DISTINCTION STILL EXISTED, THE COURT WOULD NONETHELESS HOLD AS A MATTER OF LAW THAT THE AD REGARDING SENN IS CLEARLY EXPRESS ADVOCACY UNDER THE AUTHORITY OF WSRP, WHICH CLEARLY HELD THAT STATE RESTRICTIONS FOR REPORTING REQUIREMENTS CAN BE APPLIED. WSRP INCLUDED IN ITS DEFINITION OF EXPRESS ADVOCACY IF IN THAT AD THE CANDIDATE'S CHARACTER AND CAMPAIGN TACTICS ARE ATTACKED, THE AD MAY BE SUBJECT TO ONLY ONE REASONABLE INTERPRETATION AND EXHORTATION: TO VOTE AGAINST A CANDIDATE.

WSRP ALSO DEFINED ISSUE ADVOCACY AS ADVOCACY THAT INTENDS TO INFORM THE PUBLIC ABOUT PARTICULAR ISSUES GERMANE TO AN ELECTION. IN THE INSTANT CASE THERE WERE TWO ADVERTISEMENTS OF MS. SENN'S RECORD AS AN INSURANCE COMMISSIONER. THE FIRST AD IS ISSUE ADVOCACY BEYOND THE REACH OF GOVERNMENT REGULATION PROTECTED BY THE FIRST AMENDMENT. THE SECOND GENERALLY FITS IN THE SAME CATEGORY EXCEPT FOR ONE LINE WHICH CLEARLY TRANSITIONS THE SCOPE OF THE AD FROM ISSUE TO EXPRESS ADVOCACY. THAT BEING, "SENN EVEN TRIED

TO COVER UP THE DEAL FROM STATE LEGISLATORS."

UNDER ANY NOTION OF RATIONAL INTERPRETATION THE SUGGESTION THAT AN ELECTED OFFICIAL ENGAGED IN A "COVER UP" IS AN ASSERTION THAT CLEARLY AND UNAMBIGUOUSLY SUGGESTS THE OFFICIAL ENGAGED IN AN ACT OF DECEIT, DECEPTION, FRAUD OR CONCEALMENT.

UNDER THE WORDS QUOTED BY THE SUPREME COURT IN MCCONNELL IN FOOTNOTE 78, THE NOTION THAT THIS ADVERTISEMENT WAS DESIGNED PURELY TO DISCUSS THE ISSUES AND NOTED A PERSONAL ATTACK ON THE CHARACTER STRAINS CREDULITY. ANY LISTENER KNOWING OF THE CITIZEN'S CANDIDACY FOR ATTORNEY GENERAL WOULD HAVE ONLY ONE REASONABLE INTERPRETATION: THAT IS, THAT THE AD WAS AN EXHORTATION TO VOTE AGAINST SENN. IT IS CLEAR TO THIS COURT THAT AN ASSERTION THAT A PUBLIC OFFICIAL WAS INVOLVED IN A COVER-UP IS NOT A DISCUSSION OF ISSUES; IT IS A CLEAR ATTACK ON THE CHARACTER OF THE CANDIDATE.

IN MAKING THIS DETERMINATION THE COURT AGREES WITH VEC THAT A MAJOR PURPOSE OF THE FIRST AMENDMENT IS TO PROTECT THE FREE DISCUSSION OF GOVERNMENTAL AFFAIRS, INCLUDING THE DISCUSSION OF CANDIDATES. HOWEVER, WHEN THE NATURE, SCOPE AND BREADTH, AS IN THIS CASE, EXCEEDS CONSTITUTIONAL PROTECTIONS, IT CANNOT BE SANCTIONED BY THE COURT.

IN THIS ANALYSIS THE COURT ALSO REJECTED VEC'S ARTICLE I, SECTION 5 ARGUMENT. VEC'S GUNWELL ANALYSIS IS FLAWED. THIS COURT HOLDS THAT AFTER REVIEWING THE ANALYSIS OF THE RESPECTIVE PARTIES, ANY ADDITIONAL PROTECTIONS SHOULD BE EXTENDED TO THE VOTERS' RIGHT TO INFORMATION REGARDING POLITICAL ACTIVITY, NOT THE RIGHT OF VEC TO RESTRICT DIS-CLOSURE OF THE INFORMATION.

THE FINAL GUNWELL FACTOR, THAT IS "MANAGED WITH PARTICULAR STATE INTEREST OR LOCAL CONCERN" IS A MATTER OF PARTICULAR IMPORTANCE IN THIS COURT'S CONCLUSION AND ANALYSIS. THE AUTHORITIES CITED BY THE PARTIES PERSONALLY, THE HISTORY, THE CURRENT STATEMENT OF STATE AND FEDERAL LAW, INDICATES THAT THE GROWING TREND IN THIS COUNTRY IS TO PROVIDE GREATER PROTECTION FOR THE LISTENING PUBLIC ON THE FINANCING OF CAMPAIGNS.

IN THIS REGARD IF THERE IS TO BE GREATER PROTECTION, WASHINGTON PRECEDENT MAKES IT CLEAR THAT IT IS TO BE CONSISTENT WITH THE PROTECTION OF THE PUBLIC. MOREOVER, WHILE THERE WAS NO EVIDENCE OR SUPPORT OF AUTHORITY OF WASHINGTON CONSTITUTIONAL HISTORY ADDRESSING THE SCOPE OF PROTECTION OF ARTICLE 1, SECTION 5, IT WOULD APPEAR A FAIR READING SHOULD BE CONSTRUED TO PROVIDE GREATER OPPORTUNITY FOR WASHINGTON VOTERS TO RECEIVE

INFORMATION IN THE ELECTION PROCESS THAN TO RESTRICT IT.

VEC HAS ALSO ALLEGED THAT REQUIRING THEM TO REGISTER AND DISCLOSE CONSTITUTES A PRIOR RESTRAINT. THIS CLAIM IS NOT SUPPORTED IN LAW OR IN FACT. THE PDC DEMAND TO REGISTRATION IS NOT BEING DONE TO REGULATE THE CONDUCT OF THE VEC AND/OR PROHIBIT ANY EXPRESSION OF SPEECH. THE CLEAR STATUTORY PURPOSE OF THE REGULATION IS THE IDENTIFICATION OF THOSE WHO SPONSORED THE SPEECH. THIS ACTIVITY DOES NOT RISE TO THE LEVEL OF BEING A PRIOR RESTRAINT.

LAST VEC SEEKS INJUNCTIVE RELIEF UNDER 42 USC, SECTION 8, 1983. PLAINTIFFS' MOTION TO DISMISS IS GRANTED. VEC HAS FAILED IN ALL RESPECTS TO PROVE ANY ELEMENT OF A 1983 CLAIM.

FOR ALL THE FOREGOING REASONS THE PDC'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. VEC'S MOTION FOR SUMMARY JUDGMENT IS DENIED. AND INTERVENOR'S MOTION TO COMPEL ADDITIONAL DISCOVERY IS DENIED BASED ON COUNSEL'S CONCESSIONS IN ORAL ARGUMENT.

THIS IS THE COURT'S RULING IN THIS MATTER.

COUNSEL, DO YOU HAVE AN ORDER AVAILABLE FOR THE COURT AT THIS TIME?

MS. DALTON: NOT AT THIS TIME.

THE COURT: I'LL GIVE YOU A DATE AND

TIME FOR FORMAL PRESENTMENT TO THE COURT. IF THE PARTIES ARE IN AGREEMENT AS TO THE LANGUAGE, YOU CAN SUBMIT THE ORDER TO THE COURT EX PARTE WITHOUT PRESENTATION. IF THERE'S ANY ISSUE OF LANGUAGE TO BE INCLUDED, THE COURT'S BAILIFF AT THIS TIME WILL GIVE YOU A DATE AND TIME FOR FORMAL PRESENTMENT.

COUNSEL, HOW MUCH TIME WILL THE PARTIES NEED FOR FORMAL PRESENTMENT?

MR. WHITE: TWO WEEKS.

MS. DALTON: TWO WEEKS, YES.

THE BAILIFF: SETTING IT AS A MORNING MATTER, JUDGE?

THE COURT: COUNSEL, DO YOU THINK YOU'LL NEED MORE THAN 15 MINUTES OR SO FOR PRESENTMENT?

MS. DALTON: NO. I THINK WE'LL AGREE TO THE TERMS OF THE ORDER AS IS.

THE COURT: WE'LL SET IT AS A MORNING MATTER. AND, COUNSEL, IF ALL PARTIES SIGN OFF ON THE ORDER, PLEASE CONTACT THE BAILIFF, AND THE HEARING DATE WE'RE ABOUT TO GIVE YOU WILL BE STRICKEN, AND NO PARTY NEEDS TO APPEAR.

THE BAILIFF: TUESDAY, SEPTEMBER 6TH AT 8:45 AM.

THE COURT: COUNSEL, IF THERE'S A POINT OF CLARIFICATION IN WHATEVER ORDER THAT YOU'RE PREPARING, I'LL GIVE YOU TWO ALTERNATIVES. THE FIRST IS IF THERE'S NO OBJECTION, YOU CAN CONTACT THIS COURT,

AND WE CAN SET UP A TELEPHONE CONFERENCE TO MINIMIZE THE PARTIES HAVING TO COME BACK TO THE COURT FOR CLARIFICATION. IF YOU WISH TO HAVE THE ISSUES AND QUESTIONS A MATTER OF FORMAL
RECORD, WE CAN ALSO DO THAT IN COURT ON THE DATE OF THE FORMAL PRESENTATION. I'M JUST TRYING TO MAKE IT EASIER ON THE PARTIES, WHICHEVER WAY YOU WANTED TO DO IT. I'LL GIVE YOU A DATE FOR FORMAL PRESENTMENT.

WE'LL BE IN RECESS.

(WHEREUPON THE HEARING IN THE ABOVE-ENTITLED MATTER CONCLUDED AT 11:17 AM.)

APPENDIX C

BEFORE THE PUBLIC DISCLOSURE COMMISSION OF THE STATE OF WASHINGTON

PDC CASE NO. 05-027

ORDER OF REFERRAL TO THE WASHINGTON STATE ATTORNEY GENERAL'S OFFICE

IN RE COMPLIANCE WITH RCW 42.17

VOTERS EDUCATION COMMITTEE, BRUCE BORAM, VALERIE HUNTSBERRY and other Unknown Agents,
Respondents.

INTRODUCTION

This matter came before the Washington State Public Disclosure Commission on September 9, 2004, at its Special Commission Meeting at the PDC offices in the Evergreen Plaza Building, Room 206, 711 Capitol Way South, Olympia, Washington. Those present by telephone included Commission members Michael Connelly, Chair, Jeannette Wood, Vice-chair, Earl Tilly, and Jane Noland; Those present at the PDC offices included Commission member Francis Martin, Secretary; PDC Executive Director Vicki Rippie; PDC Assistant Director Susan Harris; PDC Director of Compliance Philip E. Stutzman; Senior Assistant Attorney General Linda A. Dalton; and Senior Assistant Attorney General Linda Moran. Voters Education Committee was provided advance notice of the meeting and advance notice of the meeting and this matter were posted on the PDC's website. John J. White, Jr., representing

Voters Education Committee, et al. was present by telephone and addressed the Commission.

Susan Harris, representing PDC Staff, presented the Commission with an oral summary of the issues and alleged apparent multiple violations of RCW 42.17.040 through 42.17.090 and RCW 42.17.120 by Voters Education Committee, Bruce Boram, Valerie Huntsberry and other unknown agents. The Commission also reviewed a written memorandum from Staff with attached exhibits regarding this matter and a written response from John J. White, Jr. on behalf of Voters Education Committee et al.

Following the oral presentation by Staff and consideration of the materials submitted by Staff and Voters Education Committee, and after deliberation, the Commission directed the following:

ORDER OF REFERRAL

By a unanimous vote, the Commission finds apparent multiple violations of RCW 42.17.040 through 42.17.090 and RCW 42.17.120 by Voters Education Committee, Bruce Boram, Valerie Huntsberry and other unknown agents by failing to register and report as a political committee; by failing to file detailed reports of their contributions received and expenditures made; and by concealing the amount and identity of the source(s) of their contributions and the amount and recipients of their expenditures.

In lieu of holding an enforcement hearing, the Commission unanimously refers the above referenced apparent multiple violations to the Washington State Attorney General's Office for appropriate action pursuant to RCW 42.17.360 and .395 and WAC 390-37-100, including seeking a court order compelling

Voters Education Committee, Bruce Boram, Valerie Huntsberry or other unknown agents of the Committee to file the disclosure reports required by RCW 42.17.040 through 42.17.090.

DATED THIS 9th day of September, 2004.

FOR THE COMMISSION:

_____

VICKI RIPPIE, Executive Director

Copies to be provided to:

Linda A. Dalton, Senior Assistant Attorney General Counsel for Commission Staff

Nancy Krier, Senior Counsel for Commission

Linda Moran, Senior Assistant Attorney General

John J. White, Jr., Counsel for Voters Education Committee, et al.

[LOGO]

State of Washington

PUBLIC DISCLOSURE COMMISSION

711 Capitol Way Rm. 206, PO Box 40908 • Olympia, Washington 98504-0908 • (360) 753-1111
• FAX (360) 753-1112 Toll Free 1-877-601-2828
•E-mail: pdc@pdc.wa.gov • Website: www.pdc.wa.gov

TO: Members, Public Disclosure Commission

FROM: Susan Harris, Assistant Director

DATE: September 9, 2004

SUBJECT: Voters Education Committee, Bruce Boram, Valerie Huntsberry and other Unknown Agents—Apparent Failure to Register and Report as a Political Committee

LAW

RCW 42.17.040 through RCW 42.17.090 requires that a person or entity with the expectation of receiving contributions or making expenditures in support of or in opposition to any candidate or any ballot proposition register with the Public Disclosure Commission and file frequent and detailed reports of contribution and expenditure activities.

RCW 42.17.120 states: "No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment."

FACTS

Summary—The Public Disclosure Commission staff became aware that on or about September 2, 2004, advertisements began to be broadcast on television stations around Washington State that are identified as being paid for by Voters Education Committee. The ads concerned Deborah Senn, a candidate for Attorney General, who is on the September 14, 2004 primary election ballot.

The Voters Education Committee has filed form 8871, Notice of Section 527 Status, with the Internal Revenue Service identifying Bruce Boram as the Contact and Valerie Huntsberry as the Custodian of Records. As stated on this form, the purpose of the organization is "a non-partician (sic), non-profit, non-discriminatory, political action committee which provides issue education." (SEE ATTACHMENT 1)

Staff obtained and reviewed a copy of the Committee's initial ad that was broadcast on KIRO TV on September 3, 2004. The text of the audio portion of the ad is as follows:

> "Who is Deborah Senn looking out for? As Insurance Commissioner, Senn suspended most of the $700,000 fine against an insurance company in exchange for the company's agreement to pay for four new staff members in Senn's own office. Senn even tried to cover up the deal from state legislators. The Seattle Post Intelligencer said Senn's actions easily could lead to conflict of interest abuses. Deborah Senn let us down. Log on to learn more."

It has been reported in the media that at least $500,000 has been paid or pledged to various TV stations around the state. Staff has verified that at

least $365,000 has been spent at three TV stations in the Puget Sound area. The ads have been running in media outlets throughout the state, including Seattle, Tacoma, Yakima and Spokane.

In determining what is "express advocacy" and thus requires a committee to register and report their activities, the Washington Supreme Court in *Washington State Republican Party v. Washington State Public Disclosure Commission et al.*, 141 Wn.2d 245, 270 4 P.3d 808 (2000), stated, "[W]hen a candidate's character and campaign tactics are attacked, the ad may be subject to only one reasonable interpretation: an exhortation to vote against the candidate." Following this decision, the Commission issued an interpretive opinion that is posted on the Commission's website, outlining the Court's and Commission's view of what "express advocacy" is.

We are not here today because the ad was negative in tone, and certainly not because it was partisan. We are here today because Deborah Senn's character was attacked, and as such, the ad constitutes "express advocacy."

Staff asserts that the ad constitutes an attack on the character of Ms. Senn. The first sentence, "Who is Deborah Senn looking out for" attacks Ms. Senn's character. It is worded in the present tense and when taken in context with the remainder of the message, it tells the viewer that she was less than honorable in carrying out her public duties; that she put her office's interests ahead of the public interest, ahead of doing the right thing.

The sentence, "Senn even tried to cover up the deal from state legislators" is an additional attack on Ms. Senn's character. The dictionary definition of the

term "cover up" is "an effort or strategy intended to conceal something, as a crime or scandal." The plain meaning of the words "cover up" connote dishonest activity by the perpetrator. Therefore, use of the term "cover up" constitutes an accusation that Ms. Senn engaged in under-handed activity and is not to be trusted.

The advertisement, taken as a whole, represents an assault on Ms. Senn's character as contemplated by the Washington Supreme Court because it goes beyond taking issue with Ms. Senn's actions as Insurance Commissioner, and assails her integrity and credibility.

Voters Education Committee is a Political Committee—Voters Education Committee, Bruce Boram, Valerie Huntsberry and other unknown agents (VEC et al.) made significant expenditures for broadcast advertising that maligned Ms. Senn's character resulting in express opposition to her election. This activity makes Voters Education Committee and its agents a political committee under state law and requires the committee to register and file detailed reports of contributions received and expenditures made with the Public Disclosure Commission. To date, neither Voters Education Committee, Bruce Boram, Valerie Huntsberry nor other unknown agents of Voters Education Committee have registered or reported as required by the Public Disclosure Law. In fact, through their counsel, they have refused to do so by claiming that their ad is issue advocacy.

VEC et al. have Concealed Activities—PDC staff informed Voters Education Committee, its contact person, Bruce Boram, and its custodian of records, Valerie Huntsberry, on September 7, 2004 that it had until 12:00 p.m. (Noon) on September 9, 2004 to file

all required forms, including a committee registration statement and detailed reports of contributions received and expenditures made.

After being put on notice, VEC et al. failed to comply with PDC staff's request to file the required reports. VEC et al. have received contributions and/or made expenditures in such a manner so as to conceal the identity of the source(s) of their contributions and in such a manner as to conceal their expenditures.

CONCLUSION AND RECOMMENDATION

Based on the facts specified above, staff recommends that the Commission find apparent multiple violations of RCW 42.17.040 through 42.17.090 and 42.17.120 by Voters Education Committee, Bruce Boram, Valerie Huntsberry, and other unknown agents of Voters Education Committee by:

- failing to register and report as a political committee;
- failing to file detailed reports of their contributions received and expenditures made;
- concealing the amount and identity of the source(s) of their contributions and the amount and recipients of their expenditures.

Based on these findings, the Commission is urged to refer the matter to the Office of the Attorney General for appropriate action, including seeking a court order compelling Voters Education Committee, Bruce Boram, Valerie Huntsberry or other unknown agents of the Committee to file the disclosure reports required by RCW 42.17.040 through 42.17.090.

APPENDIX D

THE SUPREME COURT OF WASHINGTON

[Filed Dec. 11, 2007]

No. 77724-1

VOTERS EDUCATION COMMITTEE, a Washington corporation; BRUCE BORAM, an individual; VALERIE HUNTSBERRY, an individual,
Appellants,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION; MICHAEL C. CONNELLY, JEANETTE WOOD, FRANCIS MARTIN, EARL TILLY, and JANE NOLAND, Commissioners of the Washington State Public Disclosure Commission in their individual capacities, *et al.*,
Respondents,

and

DEBORAH SENN,
Respondent / Intervenor

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having considered the Motion for Reconsideration of Appellants Voters Education Committee, *et al.*;

Now, therefore, it is hereby

ORDERED:

That the Motion for Reconsideration of the Appellants Voters Education Committee, *et al.* is denied.

DATED at Olympia, Washington this 11th day of December, 2007.

For the Court

/s/ Gerry L. Alexander
GERRY L. ALEXANDER
CHIEF JUSTICE

APPENDIX E

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

[Filed Sept. 10, 2004]

No. 04-2-23551-1SEA

VOTERS EDUCATION COMMITTEE, a Washington nonprofit corporation; BRUCE BORAM, an individual; VALERIE HUNTSBERRY, an individual,

Plaintiffs,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION; MICHAEL CONNELLY, JEANETTE WOOD, FRANCIS MARTIN, EARL TILLY, and JANE NOLAND, Commissioners of the Washington State Public Disclosure Commission in their individual capacities, VICKI RIPPIE, Executive Director of the Washington State Public Disclosure Commission, in her individual capacity, and CHRISTINE GREGOIRE, Attorney General of the State of Washington in her individual capacity,

Defendants.

COMPLAINT FOR DECLARATORY
JUDGMENT AND FOR INJUNCTIVE RELIEF

COME NOW the plaintiffs, Voters Education Committee ("VEC"), Bruce Boram, and Valerie Huntsberry, and for causes of action against the defendants allege and state as follows:

I. PARTIES

1.1 Plaintiff VEC is a nonprofit corporation, formed in 2002, based in King County and is in good standing with the State of Washington.

1.2 Plaintiff Bruce Boram is a resident of King County, Washington.

1.3 Plaintiff Valerie Huntsberry is a resident of King County, Washington.

1.4 Defendant Washington State Public Disclosure Commission ("PDC") is an administrative agency for the State of Washington, as defined by RCW 34.05.010(2).

1.5 Defendants Michael Connelly, Jeanette Wood, Francis Martin, Earl Tilly, and Jane Noland are Commissioners of the PDC and are sued herein in their individual capacity while acting under the color of state law.

1.6 Defendant Vicki Rippie is Executive Director of the PDC and is sued herein in her individual capacity while acting under color of state law.

1.7 Defendant Christine Gregoire is the Attorney General for the State of Washington and is sued herein in her individual capacity while acting under color of state law.

II. JURISDICTION AND VENUE

2.1 Subject matter jurisdiction over this case is conferred by Chapter 42.17 RCW, Chapter 42.30 RCW, RCW 7.24.020, and 28 U.S.C. § 1343.

2.2 Venue in King County Superior Court is conferred by RCW 34.05.514(1)(b) and RCW 4.92.010 because VEC is based in King County and Bruce Boram and Valerie Huntsberry are residents of King County.

III. FACTUAL ALLEGATIONS

3.1 VEC is registered as a Section 527 political organization under the Internal Revenue Code. On September 1, 2004, VEC began airing television advertisements criticizing former Washington State Insurance Commissioner Deborah Senn's record as insurance commissioner. Deborah Senn is currently a candidate for Attorney General. The advertisements are political speech.

3.2 Claiming the advertising "maligns a candidate's character" and thus constitutes "express advocacy," the PDC took the position that VEC is subject to registration and reporting under RCW 42.17.040 through .090 and RCW 42.17.120. On September 7, 2004, the PDC, through Philip Stutzman, its compliance director, demanded that VEC register with the PDC as a political committee and file reports of contributions and expenditures.

3.3 On September 8, 2004, the PDC released an "Special Meeting Agenda" for a meeting to be held on September 9, 2004 at 1:30 p.m. The agenda indicated only that there was to be a "Report regarding Voters Education Committee."

3.4 The Special Meeting Agenda contained no reference to Bruce Boram, Valerie Huntsberry, or any other natural person. No notice was provided that the PDC would make any findings regarding the conduct of persons not disclosed in the agenda.

3.5 The Special Meeting Agenda provided no indication that any action would be taken at the meeting or that there were any alleged violations of Chapter 42.17 RCW.

3.6 On September 9, 2004 at 1:30 p.m., PDC staff issued a report and alleged violations of Chapter 42.17 RCW. The report called on the Commission to

refer the matter to the Attorney General, notwithstanding the lack of prior notice.

3.7 On September 9, 2004 at 1:30 p.m., the PDC held a "Special Commission Meeting" in which it "found apparent multiple violations of RCW 42.17.040 through 42.17.090 and RCW 42.17.120 by Voters Education Committee, Bruce Boram, Valerie Huntsbeny and other unknown agents." The PDC was advised at the meeting that no notice of any planned action had been given until 12:30 that afternoon.

3.8 The PDC issued an Order of Referral to the Washington State Attorney General's Office for an enforcement action, finding that VEC, Bruce Boram, and Valerie Huntsberry or other unknown agents had committed apparent multiple violations of Chapter 42.17 RCW, notwithstanding the lack of prior notice to VEC, Mr. Boram, Ms. Huntsberry, or to the public as required by Washington's Open Public Meetings Act, Chapter 42.30 RCW.

IV. VIOLATION OF CIVIL RIGHTS

4.1 The facts alleged in paragraphs 3.1 through 3.8 above are incorporated herein by reference.

4.2 42 U.S.C. § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

4.3 VEC's advertising is protected speech under the First Amendment to the U.S. Constitution, Article I, Section 5 of the Washington State Constitution, and the Washington State Supreme Court's decision in *Washington State Republican Party v. PDC*, 141 Wn.2d 245, 4 P.3d 808 (2000) as issue advocacy.

4.4 Plaintiffs are entitled under the Fourteenth Amendment to the U.S. Constitution to substantive and procedural due process, which they were denied by the PDC's failure to provide adequate prior notice of the action to be taken in its Special Commission Meeting.

4.5 Commissioners and Executive Director of the PDC, acting in their individual capacities under color of state law, have violated the plaintiffs their constitutional rights to freedom of speech and due process. In particular, those rights were violated when the PDC found, without prior notice to plaintiffs, that there were apparent multiple violations of Chapter 42.17 RCW in VEC's political speech and by the PDC's order referring the alleged violations to the Attorney General for further action.

4.6 Continued prosecution of the alleged violations by the PDC, its Commissioners and Executive Director, and the Attorney General will restrict, abridge, infringe and impair the freedom of speech of VEC. These actions, moreover, impermissibly chill the freedom of speech of any persons who want to participate in future issue advocacy.

4.7 The defendants' actions are unconstitutional as they chill and irreparably harm VEC and other persons' First Amendment rights to speak freely to the citizens of this State concerning germane issues in the 2004 election cycle.

4.8 Damages are an inadequate remedy to make VEC whole; therefore, VEC does not request damages from the individual defendants, but rather requests that individual defendants be enjoined from further prosecution and that the Court declare that the PDC's application of Chapter 42.17 RCW to VEC's issue advocacy is unconstitutional under the First Amendment to the U.S. Constitution and Article I, Section 5 of the Washington State Constitution.

V. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

5.1 The facts and legal claims alleged in paragraphs 3.1 through 3.8 and 4.1 through 4.8 above are incorporated herein by reference.

5.2 RCW 34.05.514 provides for judicial review of any administrative action in the Superior Court in the county of the petitioner's residence or principal place of business.

5.3 RCW 34.05.558 provides that judicial review of the facts shall be confined to the record, unless supplemented pursuant to RCW 34.05.562, and shall be conducted by the Court without a jury.

5.4 RCW 34.05.570(3)(a) provides that the Court shall grant relief from an agency order in an adjudicative proceeding if it determines that the order is a violation of constitutional provisions on its face or as applied.

5.5 RCW 34.05.570(3)(d) provides that the Court shall grant relief from an agency order if the agency has erroneously interpreted or applied the law.

5.6 For the reasons stated above in paragraphs 3.1 through 4.6, the PDC has acted unconstitutionally and has erroneously interpreted or applied

the law in finding apparent violations of Chapter 42.17 RCW.

5.7 RCW 34.05.550(4) permits this Court to enter a temporary and permanent stay of the PDC's order finding apparent violations of Chapter 42.17 RCW in VEC's issue advocacy.

VI. VIOLATION OF OPEN PUBLIC MEETINGS ACT

6.1 The facts and legal claims in paragraphs 3.1 through 3.8, 4.1 through 4.8, and 5.1 through 5.7 above are incorporated herein by reference.

6.2 RCW 42.30.080 requires that any action taken at a special meeting of a public agency be reflected in an agenda distributed at least 24 hours in advance of the meeting. The notice must "specify the time and place of the special meeting *and the business to be transacted. Final disposition shall not be taken on any other matter* at such meetings by the governing body." RCW 42.30.080 (emphasis added).

6.3 Although the PDC knew during the September 9, 2004 Special Commission Meeting that it had not provided notice of alleged violations and any enforcement action, it proceeded to take a final disposition on these matters and against parties not named or otherwise identified in its agenda.

6.5 RCW 42.30.130 permits this Court to enjoin violations of the Open Public Meetings Act by members of a governing body.

VII. DECLARATORY JUDGMENT

7.1 The facts and legal claims alleged in paragraphs 3.1 through 3.8, 4.1 through 4.8, 5.1 through 5.7, and 6.1 through 6.5 above are incorporated herein by reference.

7.2 RCW 7.24.020 allows any person "whose rights . . . are affected by a statute [to] have determined any question of construction . . . arising under the . . . statute . . . and obtain a declaration of rights . . . thereunder."

7.3 The Court should declare that there is no apparent or actual violation of Chapter 42.17 RCW by VEC's issue advocacy in the advertisements critical of Deborah Senn's official conduct as Insurance Commissioner.

VIII. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment:

1. Declaring that VEC's advertisements are protected speech under the First Amendment to the U.S. Constitution;

2. Declaring that VEC's advertisements are protected speech under Article I, Section 5 of the Washington State Constitution;

3. Restraining the PDC and individual defendants against further enforcement of Chapter 42.17 RCW for VEC's advertisements critical of Deborah Senn's official conduct as Insurance Commissioner which are issue oriented and do not expressly advocate the election or defeat of any candidate;

4. Declaring that the PDC violated the Open Public Meetings Act;

5. Awarding plaintiffs their reasonable attorneys' fees and costs under 42 U.S.C. § 1988, RCW 42.17.400, RCW 42.30.120(2), RCW 4.84.350, and any other applicable statutes; and

6. Granting such other and further relief as may be just and equitable.

DATED this 9 day of September, 2004.

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC

/s/ John J. White
John J. White, Jr., WSBA #13682
Kevin B. Hansen, WSBA #28349
Attorneys for Plaintiffs

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

NO. 04-2-23551-1 SEA

VOTERS EDUCATION COMMITTEE, a Washington nonprofit corporation; BRUCE BORAM, an individual; VALERIE HUNTSBERRY, an individual,

Plaintiffs,

vs.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION; MICHAEL CONNELLY, JEANETTE WOOD, FRANCIS MARTIN, EARL TILLY, and JANE NOLAND, Commissioners of the Washington State Public Disclosure Commission in their individual capacities, VICKI RIPPIE, Executive Director of the Washington State Public Disclosure Commission, in her individual capacity, and CHRISTINE GREGOIRE, Attorney General of the State of Washington in her individual capacity,

Defendants,

and

DEBORAH SENN,

Intervenor.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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* * * *

C. The PDC bears a "well-nigh insurmountable burden" when attempting to regulate political speech. The Constitution bars the PDC from regulating political speech unless the speech expressly advocates the election or defeat of a candidate for office.

The First Amendment looks unfavorably upon any government participation in public debate because that participation inevitably results in government censorship. This concern is paramount when the government regulates political speech, because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-74, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). "The right of free public discussion of the stewardship of public officials [is] a fundamental principal of the American form of government." *New York Times v. Sullivan*, 376 U.S. 254, 275, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). As the U.S. Supreme Court stated in *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."

This right to free public discussion is particularly important during election campaigns. "The right to speak out at election time is one of the most zealously guarded under the First Amendment." *Washington State Republic Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 264, 4 P.3d 808 (2000) (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971)). In *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135

Wn.2d 618, 623-24, 957 P.2d 691 (1998), the State Supreme Court stated:

> The constitutional guarantee of free speech has its "fullest and most urgent application" in political campaigns. Therefore, the State bears a "well-nigh insurmountable burden" to justify [a] restriction on political speech. This burden requires the court to apply "exacting scrutiny" to [any such restriction]. Exacting scrutiny will invalidate the [restriction] unless the State demonstrates a compelling interest that is both narrowly tailored and necessary. Such burdens are rarely met.

(Internal citations omitted) (holding that the PDC could not penalize even maliciously false political advertising and awarding attorneys' fees for civil rights violations).

The U.S. and Washington Supreme Courts have made clear that the First Amendment permits regulation of political speech *only* where the speech contains "explicit words of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 43; see *Fed. Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986); *Republican Party*, 141 Wn.2d at 261-269. Consequently, "issue advocacy" is completely beyond the reach of government regulation. *See Republican Party*, 141 Wn.2d at 263-64.

The Buckley court identified words that constitute express advocacy, "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52; *see also Republican Party*, 141 Wn.2d at 264. Although these examples of express advocacy are

illustrative rather than exhaustive, "express advocacy necessarily requires the use of language that explicitly and by its own terms advocates the election or defeat of a candidate. If the language of the communication contains no such call to action, the communication cannot be 'express advocacy.'" *Chamber of Commerce v. Moore*, 288 F.3d 187, 196-97 (5th Cir. 2002) (emphasis in original).

The Washington State Supreme Court has adopted *Buckley's* bright-line express advocacy test. An ambiguous test that does not focus solely on the words in and of themselves "invites too much in the way of regulatory and judicial assessment of the meaning of political speech," *Republican Party*, 141 Wn.2d at 268, and would chill political speech:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Republican Party, 141 Wn.2d at 268 (quoting *Buckley*, 424 U.S. at 43). As a result:

> The most important thing to bear in mind when addressing the issue advocacy/express advocacy distinction is that to preserve core First

Amendment freedoms, the standard applied is an exacting one, with any doubt about whether a communication is an exhortation to vote for or against a particular candidate to be resolved in favor of the First Amendment freedom to freely discuss issues.

Id. at 265.

Under *Buckley* and *Republican Party*, the speaker's intent to influence an election does not alter the requirement that there be an actual call to action in the words themselves:

> . . . The Party admits that it was trying to influence an election, but it was doing so by educating the voters on the candidates' positions on the issues. The Party argues that this is a completely protected form of issue advocacy.
>
> The Party is correct. . . .
>
> . . . The fact that the commercial . . . was openly hostile [to candidates for election] did not render the commercial express advocacy, because it lacked the essential content of express advocacy—direct exhortation to the public to vote against them.
>
> . . . [E]ven though the "Tell Gary Locke" commercial was intended to persuade voters, it is still issue advocacy. The fact that the "Tell Gary Locke" ad was partisan, negative in tone, and appeared prior to the election does not strip it of its First Amendment protection for issue advocacy.

Republican Party, 141 Wn.2d at 272-73.

D. The Voters Education Committee advertisements do not explicitly advocate the election or defeat of Deborah Senn.

There is no "call to action" in the VEC's advertisements other than an invitation to "log on to learn more." The web site referenced in the ads offers links to articles about Ms. Senn's record as Insurance Commissioner, but also does not advocate her defeat in the primary election. Neither the ads nor the web site mention Ms. Senn's candidacy for Attorney General at all.

The VEC advertisements can be contrasted to an advertisement that appeared a week before the 1980 presidential election which the Ninth Circuit found to be express advocacy:

> DON'T LET HIM DO IT.
>
> The President of the United States continues degrading the electoral process and lessening the prestige of the office.
>
> It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.
>
> *And we let him.*
>
> It continued when the President himself accused Ronald Reagan of being unpatriotic.
>
> *And we let him do it again.*
>
> In recent weeks, Carter has tried to buy entire cities, the steel industry, the auto industry, and others with public funds.
>
> *We are letting him do it.*

He continues to cultivate the fears, not the hopes, of the voting public by suggesting the choice is between "peace and war," "black or white," "north or south," and "Jew vs. Christian." His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why Not the Best?"

It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning.

DONT LET HIM DO IT.

Fed. Election Comm'n v. Furgatch, 807 F.2d 857, 858 (9th Cir. 1987). Focusing on the words "don't let him," the court found there was an express call to action urging voters to vote against Jimmy Carter. *Id.* at 864-65. In contrast, there is no express call to action either for or against Ms. Senn in the VEC advertisements. At most, viewers are directed to visit a web site that contains other newspaper articles on the insurance crisis, including articles criticizing Ms. Senn's conduct as Insurance Commissioner.

The PDC's Order does not allege that any words of explicit advocacy appear. Instead, the PDC takes the position that the VEC advertisement at issue attacks Ms. Senn's character, which can only be interpreted as an express call to vote against Ms. Senn. The PDC staff memo, upon which the Commission based its Order, asserts that the question "Who is Deborah Senn looking out for?" is a character attack. The staff also asserted that "cover-up" language—quoted from news stories—is likewise an attack on character that renders the ad express advocacy. Although a

character attack, without explicit words of advocacy, is not express advocacy, the advertisement does not attack Ms. Senn's character.

The content of the advertisement is based entirely on newspaper articles and editorials on the 1996 settlement agreement between the Office of the Insurance Commissioner and Prudential Insurance. In a February 20, 1997 article, "Lawmaker Says Senn Diverts Fine—Deal Pays Staff In Her Office," the Seattle Times reported:

> A powerful Republican lawmaker says the agreement is illegal and that Senn, a Democrat, and her staff tried to cover it up when legislators became curious about the money.
>
> "They were trying to hide this from the Legislature and the people," said Senate Ways and Means Chairman Jim West, R-Spokane. "It's clearly, clearly, against the law."

On February 26, 1997, the Times editorialized in "Senn's 'Fine' Mess":

> . . . Senn has used the power of her office to put herself and her staff first in line for money that belongs to the state's general fund.
>
> * * * *
>
> . . . Senn dubbed the historic fine against Prudential a "state insurance assessment" or "contribution" and diverted $600,000 to her office coffers over the next two years.
>
> Senn was less than forthcoming with the public about this brazen scheme to boost her budget with the required legislative oversight. She provided no details of the waiver in her announcement of the settlement with Prudential last fall. Nor did she let

> folks in Olympia know about it when she testified about the fine (yes, she did call it a fine) at a Senate hearing. Not until Senate Ways and Means Chairman Jim West, a Spokane Republican, sent an attorney to the commissioner's office to track the money did the arrangement finally come to light.
>
> * * * *
>
> What is certain is that Senn bent the rules. Funding new staffers by extracting "contributions" from insurers is shady business. . .

In running the advertisements, VEC was engaging in a protected "public discussion" of Ms. Senn's "stewardship" of her position as Insurance Commissioner. *See New York Times v. Sullivan*, 376 U.S. at 275. As explained by the Supreme Court in *Fed. Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 249, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986), "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues *and candidates* from more pointed exhortations to vote for particular persons." (Emphasis added) VEC's ads criticized Ms. Senn's official conduct in 1996 and 1997, not her character. The fact that her official conduct may incidentally reflect on her character does not transform VEC's speech into express advocacy. Factual statements such as "Candidate X voted against consumers in favor of polluters," "Candidate Y is backed by out-of-state special interests," or "Candidate Z opposed expanding children's health care" also carry incidental messages about character, but are not thereby transformed into express advocacy. "[A]ny criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation."

Fritz v. Gorton 83 Wn.2d 275, 298, 517 P.2d 911 (1974) *(quoting Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 510 (1964)).

The VEC ads contain no direct personal attack on Ms. Senn's character such as the attack on former President Carter "for his personal qualities" in *Furgatch*: "His meanness of spirit." There is a complete absence of any reference to her personal character or to any action that was not undertaken in her official capacity as Insurance Commissioner. The personal attacks in *Furgatch* were not based on former President Carter's official conduct as *President*, but on his conduct *as a candidate* for re-election.

The PDC's position in this case, that in the *context* of the advertisement, VEC engaged in express advocacy by stating that Deborah Senn tried to cover up the terms of the insurance settlement from legislators, illustrates the danger the Supreme Court warned against in *Buckley*: "the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley*, 424 U.S. at 43.

The defendants' action must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270. The PDC's interference with VEC's political speech thwarts "a major purpose of [the First] Amendment": "to protect

the free discussion of governmental affairs. This of course includes discussions of candidates. . . ." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966). "Criticism of [government officials'] official conduct does not lose its constitutional protection merely because it is effective and hence diminishes their official reputations." *Sullivan*, 376 U.S. at 273. This historical protection is nearly as old as the republic. The U.S. Supreme Court noted:

> It is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures . . . .
>
> . . . The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

Sullivan, 376 U.S. at 275 n.15 (quoting *The Report on the Virginia Resolutions*, 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 575 (1876)).

Even *if* the ad at issue were "susceptible only to an interpretation" that it attacked Ms. Senn's character, an attack on character without explicit words of advocacy does not constitute express advocacy.

E. Even assuming that criticism of Ms. Senn's public stewardship attacked her character, an attack on a candidate's character does not constitute express advocacy.

Although the state Supreme Court in *Republican Party* criticized *Furgatch's* "context approach"

because it "departs from the bright-line express advocacy test of *Buckley*," *Republican Party*, 141 Wn.2d at 269, the Court took note of dicta in *Furgatch*: "The [*Furgatch*] court also noted that the ad could not be characterized as issue-oriented because it directly attacked the character and campaign tactics of a candidate rather than a candidate's stand on the issues." *Id.* at 270. The *Republican Party* court then commented that "when a candidate's character and campaign tactics are attacked, the ad may be subject to only one reasonable interpretation: an exhortation to vote against the candidate." *Id.*

This statement is *dicta* because it was not essential to the Court's holding, and thus is not binding on this Court regarding the VEC advertisement. Even if the statement was otherwise binding, characterizing political speech that maligns a candidate's character, without any explicit words of advocacy, as express advocacy goes far beyond the bright-line test of *Buckley* and is unconstitutional. The Ninth Circuit's decision in *Furgatch*, in which the court fashions "a more comprehensive approach to the delimitation of 'express advocacy,' has been uniformly criticized by every court examining the decision. *See, e.g., Chamber of Commerce v. Moore*, 288 F.3d at 193 & nn.5, 6 (listing cases); *The Governor Gray Davis Comm. v. Am. Taxpayers Alliance*, 102 Cal. App. 4th 449 (2002).

In 1995, the Federal Election Commission adopted a regulation containing language that came directly from *Furgatch*:

> Expressly advocating means any communication that— . . . .
>
> (b) When taken as a whole and *with limited reference to external events, such as the proximity to*

the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b) (emphasis added). Although the regulation was "drawn quite narrowly to deal with only the 'unmistakable' and 'unambiguous' cases where 'reasonable minds cannot differ' on the message," *Maine Right to Life Comm. v. Fed. Election Comm'n*, 914 F. Supp. 8, 11 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), it has consistently and uniformly been found unconstitutional. *See, e.g., Maine Right to Life*, 98 F.3d 1 (1st Cir. 1996); *Virginia Soc'y for Human Life v. Fed. Election Comm'n*, 263 F.3d 379 (4th Cir. 2001); *Right to Life of Dutchess County v. Fed. Election Comm'n*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998).

In *Society for Human Life*, the Fourth Circuit observed:

> The regulation . . . shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer. This is precisely what *Buckley* warned against and prohibited. *Buckley* recognized that the distinction between "express advocacy" and "issue advocacy" can easily "dissolve in practical

> application." *In no event, the Court said, could the distinction depend on the understanding of the audience.* This, the Court said, would put the speaker wholly at the mercy of the varied understanding of his hearers.

263 F.3d at 391-92 (internal citations, ellipsis, and quotation marks omitted, emphasis added). The court held that the regulation violates the First Amendment "because it shifts the determination of what is 'express advocacy' away from the words 'in and of themselves' to 'the unpredictability of audience interpretation.'" *Id.* at 392.

The flaw in viewing a character attack, standing alone, as express advocacy is clear when applied to this case. The content of the VEC advertisement, including the words "cover up" and the potential for a "conflict of interest," is taken directly from press reports. Only the proximity to the election has changed.

Of interest to the present case is the Federal Election Commission's "Explanation and Justification" of 11 C.F.R. § 100.22(b): "Communications discussing or commenting on a candidate's *character*, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *Maine Right to Life*, 914 F. Supp. at 12-13 (quoting 60 Fed. Reg. at 35295) (emphasis added). This definition of express advocacy forces a speaker to "*continually re-evaluate his or her words as the election approaches*," an effect "[t]hat is sufficient evidence of First Amendment 'chill' to" render the regulation invalid. *Id.* at 13 (emphasis added).

The PDC's position in this case is similar to that of the Federal Election Commission in *Fed. Election Comm'n v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). The Commission argued that an advertisement that does not include any "express words of advocacy" may nonetheless constitute "express advocacy" if it unmistakably conveys a message urging action with respect to a particular candidate. The court quoted a portion of the Commission's brief:

> Express electoral advocacy [can] consist[] not of words alone, but of the combined message of words and dramatic moving images, sounds, and other non-verbal cues such as film-editing, photographic techniques, and music, involving highly charged rhetoric and provocative images which, taken as a whole, send an unmistakable message to oppose [a specific candidate].

Id. at 1057 (alterations in original). The court dismissed this as "little more than an argument that the FEC will know 'express advocacy' when it sees it." *Id.*

The Fourth Circuit sided with *Buckley's* "clear, categorical limitation . . . [of] explicit words of candidate advocacy . . . so that citizen participants in the political processes would not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election result." *Id.* at 1051. The government could only regulate "communications that literally include words which in and of themselves advocate the election or defeat of a candidate." *Id.* The court concluded that *Buckley* could have drawn a different line, but it

> would have come at the cost of expanded regulatory authority in a sphere where government regulation, if it is to be permitted at all, must be viewed with the utmost suspicion—a cost the Court had no difficulty concluding was too high for the incremental additional "benefits" that would be obtained by vesting broader power in the government.

Id. at 1052.

Another analogous, and recent, case is *The Governor Gray Davis Committee v. American Taxpayers Alliance*, in which the California Court of Appeal considered a television advertisement that was highly critical of Governor Gray Davis' management of "California's energy problems." At the time, Governor Davis was a candidate for re-election. "The advertisement present[ed] blurred film of Governor Davis, and other darkened, obscure visual images." *Id.* at 454. A voice then stated:

> He's pointing fingers and blaming others—Gray Davis says he's not responsible for California's energy problems. After all, the Public Utilities Commission blocked long-term cost-saving contracts for electricity. But who runs the PUC? The people Gray Davis appointed—Loretta Lynch and other Davis appointees who left us powerless. That's why newspapers say Davis ignored all the warning signals and turned a problem into a crisis. Gray outs from Gray Davis.

Id. at 455 n.2. At the bottom of the ad appeared the words: "Paid for by American Taxpayers Alliance." *Id.* at 455.

The governor's campaign committee filed suit and sought an injunction, claiming that the

advertisement "has no purpose other than to denigrate Governor Davis and unambiguously urges his defeat in 2002." *Id.* at 455 (internal quotation marks omitted). According to the campaign committee, "an ad trashing the Governor is express advocacy." *Id.* at 463 (internal quotation marks omitted). The court noted that the advertisement does not contain any explicit words of advocacy:

> No campaign or election is mentioned. Nor does the advertisement overtly encourage the viewer to vote against Governor Davis. To be sure, the advertisement criticizes Governor Davis on the issue of the energy crisis, but it fails to associate the condemnation with any express endorsement of defeat of his candidacy for Governor.

Id. at 471. The court held that "[c]ommunications that discuss the record and philosophy of specific candidates, like the one before us, do not constitute express advocacy under *Buckley* and *MCFL* unless they also contain words that exhort viewers to take specific electoral action for or against the candidates," *id.* at 471-72 (internal quotation marks omitted), and concluded that the advertisement at issue could not be regulated.

If as the PDC claims, political speech that attacks a candidate's character constitutes an express call to vote *against* the candidate, then political speech that commends a candidate's character must constitute an express call to vote *for* the candidate. However, the Fifth Circuit has ruled that the latter does not constitute express advocacy. In *Chamber of Commerce v. Moore*, the Chamber of Commerce "ran four thirty-second television advertisements, each extolling the virtues of a different candidate running for a position on the court. . . . The advertisements identified the

candidate and described in general terms the candidate's judicial philosophy, background, qualifications, and other positive qualities." *Moore*, 288 F.3d at 190.

The trial court held that "the advertisements were 'express advocacy' because, in the context of the ongoing election campaign, no reasonable person would construe the advertisements as anything but a directive to vote for the featured candidates—notwithstanding that the advertisements' express words did not call for action on the part of the voter." *Moore*, 288 F.3d at 191. The court of appeals noted that the trial court could only come to this conclusion by drawing "a distinction between the content of the advertisements and the court's view—as thoughtful as it may be—of 'true issue advocacy.'" *Id.* at 195 n.11. Significantly, the court quoted *Furgatch's dicta* regarding attacks on a candidate's character as a similar example of the pitfall of conditioning "express advocacy" on a reasonable person's understanding. *See id.* The court concluded that the phrase "Lenore Prather—A fair and independent voice for Mississippi" is not synonymous with "Smith for Congress": "The first connects a name to a positive character trait while the second connects a name to an elected office. . . [F]avorable statements about a candidate do not constitute express advocacy, even if the statements amount to an endorsement of the candidate." *Id.* at 198. The State of Washington filed an *amicus curiae* brief in *Moore*. *See id.* at 189.

The VEC advertisements accurately criticized Ms. Senn's record as Insurance Commission, and asked viewers to "log on" to find out more about the insurance crisis that she created. The PDC cannot sustain its "well-nigh insurmountable" burden to

justify its effort to punish VEC for criticizing how a public official carried out her official duties.

* * * *

DATED this 4 day of November, 2004.

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APPENDIX G

SUPREME COURT OF WASHINGTON

No. 77724-1

VOTERS EDUCATION COMMITTEE *et al.*,
Plaintiffs / Appellants,

v.

STATE OF WASHINGTON ex rel. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION *et al.*,
Defendants / Respondents,

and DEBORAH SENN,
Intervenor.

Brief of Appellants
Voters Education Committee, *et al.*

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IV. ARGUMENT

The Superior Court's ruling violates the basic principle that vague regulations of political speech are impermissible because they chill the right of free speech. Specifically, the Superior Court erroneously found that, in light of *McConnell*, the express advocacy saving construction of *Buckley* and *WSRP* is no longer relevant for vague speech regulations. But *McConnell* simply held that a statute would satisfy strict scrutiny only if it set forth a precise, objective standard for determining whether particular speech is covered. Although the Superior Court purported to apply the express advocacy saving construction anyway, it erred again by equating express advocacy with character attack. This amorphous standard is itself unconstitutionally vague. The PDC itself conceded below that there are "many definitions" of character. Thus, by approving the character attack standard, the Superior Court empowered the PDC to, in effect, create a secret set of actionable magic words: we all now know that the phrase "cover up" is on the list, but no one outside the PDC—and certainly not VEC—had any idea that "cover up" was on the list *before* VEC uttered those words. Neither the First Amendment nor article I, section 5, tolerates the chilling effect inherent in such a vague and uncertain regime.[5]

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[5] Although the Court usually resolves the State constitutional issues before the federal constitutional issues, this Brief, for analytical clarity, addresses first the federal constitutional issues. *See State v. Reece*, 110 Wn.2d 766, 770-71, 757 P.2d 947 (1988) ("[W]e commence here with First Amendment analysis under the belief that an overview of the United States Supreme Court's position on obscenity will provide helpful background for the state constitutional analysis which follows.").

A. The First Amendment prohibits vague regulations of political speech.

1. The First Amendment requires that regulations of political speech be clear and specific.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Buckley*, 424 U.S. at 41 n.48 (quotation marks omitted). Due process forbids vague punitive laws because they invite "arbitrary and discriminatory" enforcement and "trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). In addition to these due process concerns, "[t]he vagueness of a regulation [of *speech*] raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871-72, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). Vague regulations "inhibit the exercise of [First Amendment] freedoms . . . [by] lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (quotation marks and footnotes omitted); *see also WSRP*, 141 Wn.2d at 265 (same). Moreover, the danger that a vague law will chill speech "is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled, or sterilized." *Id.* at 265-66 (quotation marks omitted).

Whereas due process demands that punitive laws not be so vague that people "of common intelligence must necessarily guess at its meaning and differ as

to its application," *Connally v. General Construction Co.*, 269 U.S. 385, 391,46 S. Ct. 126, 70 L. Ed. 322 (1926), "[t]he Supreme Court has repeatedly emphasized that where First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential." *O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142 (1988); *see also State ex rel. PDC v. Rains*, 87 Wn.2d 626, 630, 555 P.2d 1368 (1976) ("[A] stricter vagueness standard is applicable in First Amendment areas."). "[I]n order to avoid vagueness and a chilling effect on political speech, *Buckley* requires the definition of election-related speech to be sharply drawn." *WSRP*, 141 Wn.2d at 266. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963), *quoted in Buckley*, 424 U.S. at 41.

2. Regulations of political speech that leave the speaker at the mercy of the listener's interpretation are unconstitutionally vague.

In *Buckley*, the United States Supreme Court established the test for determining whether a regulation of political speech is vague under the First Amendment, and the Court set forth a construction to save such regulations from unconstitutionality. Addressing a provision of the Federal Election Campaign Act of 1974 ("FECA") that reached "'any expenditure . . . relative to a clearly identified candidate,'" the Court first found that the "use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." 424 U.S. at 39, 41 (quoting 18 U.S.C. § 608(e)(l)). As part of its vagueness analysis, the Court considered but rejected

a saving construction that would have confined the provision to speech "advocating the election or defeat of a candidate." The fundamental problem with this standard, however, was that it failed to provide speakers with sufficient certainty as to the scope of the governmental regulation. In essence, speakers would have had to guess as to whether their speech would come within the regulation. The Court held that the inevitable chilling effect on political speech rendered such a regime unconstitutional. As the Court put it:

> "[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Id. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S. Ct. 315, 89 L. Ed. 430 (1945)).

Accordingly, the Court rejected the "advocating the election or defeat" saving construction as impermissibly vague and held instead that the statute would survive "only [if] limited to communications that include *explicit words* of advocacy of election or

defeat of a candidate." *Id.* at 43 (emphasis added); *see also id.* at 77, 80 (same result for different FECA provision). The Court even provided examples of "magic words" that would constitute such express advocacy. *Id.* at 44 n.52. Thus, the Court established the distinction between express advocacy and issue advocacy as a saving construction for vague regulations of political speech. *See also FEC v. Massachusetts Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 249, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) (characterizing speech at issue as an "explicit directive [to] vote for these (named) candidates").

In *FEC v. Furgatch* the Ninth Circuit, although ostensibly adhering to *Buckley's* express advocacy standard, "conclude[d] that context is relevant to a determination of express advocacy" because "[w]ords derive their meaning from what the speaker intends *and what the reader understands. A speaker may expressly advocate regardless of his intention . . . .*" 807 F.2d 857, 863 (9th Cir. 1987) (emphasis added). Obviously, the *Furgatch* context approach is fundamentally inconsistent with the *Buckley* approach because it leaves speakers "wholly at the mercy" of the interpretation of their listeners, thereby "compel[ling] the speaker to hedge and trim." *Buckley,* 424 U.S. at 43 (quotation marks omitted). In fact, the Ninth Circuit cited *Buckley* and *Thomas* as *contrary authority* for its context approach. *Furgatch*, 807 F.2d at 863.

In *WSRP*, this Court rejected *Furgatch's* context approach to express advocacy as unconstitutionally vague for precisely this reason. In that case, the Court addressed a provision of the Fair Campaign Practices Act that defined the term "expenditure" to reach anything of value "for the purpose of assisting,

benefiting, or honoring any public official or candidate." 141 Wn.2d at 282 (quotation marks omitted). The Court first adopted *Buckley's* distinction between express advocacy and issue advocacy. *Id.* at 263-66. The Court then considered the question of "what constitutes issue advocacy," and in particular whether to adhere to *Furgatch's* context approach or *Buckley's* "narrow view of express advocacy." *Id.* at 266. The Court rejected *Furgatch's* context approach because it "invites too much in the way of regulatory and judicial assessment of the meaning of political speech. . . . *Furgatch's* context approach simply adds another layer of uncertainty, and is too flexible to be consistent with *Buckley*." *Id.* at 268-69.

In fact, it appears that every federal and state appellate court that has addressed the question has rejected *Furgatch's* context approach to express advocacy in favor of *Buckley's* "explicit words" approach. *See, e.g., Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 391-92 (4th Cir. 2001) (*Furgatch's* context approach "shifts the determination of what is express advocacy away from the words in and of themselves to the unpredictability of audience interpretation," which "is precisely what *Buckley* warned against and prohibited") (quotation marks omitted).[6] In addition, courts have rejected

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[6] *See also, e.g., North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 425 n.2, 427 (4th Cir. 2003), *cert. granted, vacated, and remanded*, 541 U.S. 1007 (2004); *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 194-95 (5th Cir. 2002); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999); *League of Women Voters v. Davidson*, 23 P.3d 1266, 1276-77 (Colo. Ct. App. 2001); *The Governor Gray Davis Comm. v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534, 549-52, 102 Cal. App. 4th 449 (Ct. App. 2002); *Schroeder v.*

other approaches that, like *Furgatch's* context approach, did not assure the speaker control over meaning and therefore lacked the narrow specificity required by the First Amendment and *Buckley*. *See Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 386-387 (2d Cir. 2000) (regulation of "implicit[]" advocacy is "impermissibly vague"); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991) (FEC regulation was inconsistent with *Buckley* because it required court "to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy[,] invit[ing] just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*.").

B. The Fair Campaign Practices Act's definition of "political committee" is unconstitutionally vague.

The PDC asserts that, under Washington's Fair Campaign Practices Act, VEC is a political committee and is therefore subject to the PDC's regulatory authority. A "political committee" is "any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." RCW 42.17.020(38). The PDC claims that VEC is a political committee because its ads were expenditures in

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Irvine City Council, 118 Cal. Rptr. 2d 330, 341-42, 97 Cal. App. 4th 174 (Ct. App. 2002); *Kromko v. City of Tucson*, 47 P.3d 1137, 1140-41 (Ariz. Ct. App. 2002).

Some courts have voided an FEC regulation that incorporated *Furgatch's* context approach on the ground that it is inconsistent with *Buckley's* interpretation of FECA and therefore that FEC lacked the authority to promulgate the regulation. *See e.g., Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d. (1st Cir.) *aff'g*, 914 F. Supp. 8, 13 (D. Me. 1996); *Right to Life v. FEC*, 6 F. Supp. 2d 248, 253-54 (S.D. N.Y. 1998).

opposition to Ms. Senn's candidacy. CP 96-97, 106; CP 599-604.

This Court has already held that the phrase "in support of, or opposition to, any candidate" ("support or oppose") created an impermissibly vague regulation of political speech under the First Amendment.[7] In *Bare v. Gorton*, 84 Wn.2d 380, 526 P.2d 379 (1974), the Court considered the constitutionality of a provision of the Fair Campaign Practices Act that imposed spending limits on "election campaign" expenditures. *See* Init. No. 276 § 14 (1973) (formerly codified at RCW 42.17.140). The term "election campaign" "means any campaign *in support of or in opposition to, a candidate* for election to public office." Init. No. 276 § 2(11) (1973) (codified at RCW 42.17.020(18)) (emphasis added). In an analysis equally applicable to the provision of the Fair Campaign Practices Act at issue here, the Court said:

> [T]his scheme . . . poses intractable problems of administration and enforcement. . . .
>
> [For example], who decides and what standards are to be used in determining whether a particular communication is for or against a proposition? Imagine an advertisement which states, "If you believe you should raise your taxes for a teacher salary increase, vote for the special levy." The act provides no standards to determine how to allocate the cost of that message as for or against the proposition.

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[7] PDC implicitly conceded this point when it asserted authority to regulate VEC on the ground that VEC had engaged in "express advocacy," rather than that the "Better" ad was simply "in opposition to" Ms. Senn's candidacy. *See* CP 611, 602.

. . .

> It is evident that a person who wishes to avoid violating the provisions of section 14 faces substantial and unresolved issues of meaning and application. The rights involved with respect to the limitations imposed by section 14 are derived from the First Amendment. . . . Any legislative impingement on these rights must be drawn with precision and narrow specificity.
>
> . . .
>
> [B]oth subsections of section 14 raise the same issues of vagueness. . . .

Bare, 84 Wn.2d at 383-87.[8]

As the Court recognized, "support or oppose" is vague because this standard leaves political speakers wholly at the mercy of the PDC's interpretation of their speech. Whether an ad is found to "support or oppose" a given candidate depends to a significant degree on the beliefs of the candidate, the beliefs of the viewer, and the viewer's conception of what it means to "support" or "oppose" someone. As discussed above, this is the same problem that led the United States Supreme Court to construe the regulations at issue in *Buckley* to reach "only . . . communications that include *explicit words* of advocacy of election or

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[8] *See also North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 422-25 (4th Cir. 2003) (statute defining "support or oppose" according to *Furgatch's* context approach was unconstitutionally vague), *cert. granted, vacated, and remanded*, 541 U.S. 1007 (2004); *Anderson v. Spear*, 356 F.3d 651, 665 (6th Cir.) (statute that prohibited certain electioneering activity "for or against any candidate" was unconstitutionally vague), *reh'g and reh'g en banc denied*, 2004 U.S. App. LEXIS 7790, *and cert. denied sub nom. Stumbo v. Anderson*, 125 S. Ct. 453 (2004).

defeat of a candidate." 424 U.S. at 43 (emphasis added); *see also id.* at 77, 80. And this is the same problem that led this Court in *WSRP*, and myriad other state and federal courts, to reject *Furgatch's* context approach in favor of *Buckley's* explicit words approach. 141 Wn.2d at 268-69, 271 (Although ad might appear to "attack" candidate's position on an issue, under *Furgatch's* context approach "a viewer might agree with [the candidate's] stance on [the issue], and could choose to vote for him on the basis of the commercial."). Therefore, the definition of political committee must either be voided for unconstitutional vagueness or narrowed to reach only speech that, in explicit words, expressly advocates the election or defeat of a candidate.

C. The Superior Court committed three errors of law in analyzing VEC's ads under the First Amendment.

Against this backdrop of *Buckley* and *WSRP*, the Superior Court made three legal errors in analyzing VEC's ads under the First Amendment. First, it erred by concluding that *McConnell* rejected the distinction between express advocacy and issue advocacy for purposes of saving a vague regulation of political speech from invalidation under the First Amendment. Second, insofar as the Superior Court purported to apply the express advocacy saving construction, it erred by equating express advocacy with character attack, which is itself an unconstitutionally vague standard under the First Amendment. Third, the Superior Court erred by ruling that the ad entitled "Better" was express advocacy, and that therefore VEC is subject to the PDC's regulatory authority.

1. The Superior Court erroneously ruled that *McConnell* rejected *Buckley's* express advocacy saving construction for vague regulations of political speech.

Although the PDC effectively conceded the continuing applicability of the express advocacy standard of *WSRP* and *Buckley, see supra* note 6, the Superior Court concluded that "*McConnell* overturned a significant portion of *Buckley* as relied upon by our state supreme court in *WSRP*, and rendered a distinction between express and issue advocacy, as the decision indicated, 'functionally meaningless.' . . . Consequently, . . . the distinction between express or issue advocacy is no longer the controlling law." RP 4.

The reports of *Buckley's* death are greatly exaggerated. In *McConnell*, the United States Supreme Court rejected the view, often ascribed to *Buckley*, that the First Amendment flatly prohibits government from regulating issue advocacy, but it did not reject *Buckley's* distinction between express advocacy and issue advocacy as an appropriate means of curing an unconstitutionally vague regulation of political speech. Instead, the *McConnell* Court stated, "Our adoption of a narrowing construction [in *Buckley*] was consistent with our vagueness and overbreadth doctrines." 540 U.S. at 192 n.75. And the Court certainly did not retreat from *Buckley's* insistence that regulations of political speech be drawn with narrow specificity, and in particular that they assure the speaker control over the meaning of his speech. Rather, the Court declined to apply *Buckley's* saving construction simply because the new provision at issue in *McConnell* "raise[d] none of the vagueness concerns that drove our analysis in *Buckley*. . . . The

[provision's] components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here." *Id.* at 194 (citations omitted).

Moreover, the *McConnell* Court hardly made news, let alone vitiated *Buckley's* express advocacy saving construction, when it observed that "the line between express advocacy and other types of election-influencing expression is, for Congress' purposes, functionally meaningless." *Id.* at 217. *Buckley* itself acknowledged the self-evident point that the distinction between "discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application [because] [c]andidates . . . are intimately tied to public issues involving legislative proposals and governmental actions." 424 U.S. at 42; *WSRP*, 141 Wn.2d at 259. The Court's decision in *McConnell* merely shows that Congress has the power to regulate categories of political speech that may not qualify as express advocacy under *Buckley*—provided Congress defines the regulation's scope clearly and with narrow specificity.

In the aftermath of *McConnell*, courts have uniformly acknowledged that *Buckley's* express advocacy saving construction continues to afford a valid and appropriate saving construction for otherwise unconstitutionally vague regulations of political speech. For example, the Sixth Circuit, considering a regulation of certain electioneering activities,[9] noted

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[9] The law covered "the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of *votes for or against any candidate* or question on the ballot in any manner."

the *McConnell* Court's observation that "the line between express and issue advocacy had become 'functionally meaningless.'" *Anderson v. Spear*, 356 F.3d 651, 664 (6th Cir.) (quoting *McConnell*, 540 U.S. at 193), *cert. denied sub nom. Stumbo v. Anderson*, 125 S. Ct. 453 (2004). Nevertheless, the court explained that "while the *McConnell* Court disavowed the theory that 'the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy,' it nonetheless left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness." *Id.* at 664-65. Finding the law vague, the Sixth Circuit applied *Buckley's* express advocacy saving construction. *Id.*[10]

2. The Superior Court's character attack approach to express advocacy is impermissibly vague under the First Amendment.

Although the Superior Court was "satisfied" that it was "correct" to conclude that *McConnell* overruled

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Anderson, 356 F.3d at 663 (quotation marks omitted) (emphasis added).

[10] *See also ACLU v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004); *cf. Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 426, 429 (Minn. 2005) (because law regulating funds "the purpose of which is 'to influence the nomination or election of a candidate'" was adopted after *Buckley* was decided, court held that legislature intended to adopt *Buckley's* saving construction, *McConnell* notwithstanding) (quoting Minn. Stat. § 10A.01, subds. 27 and 28 (2004)). At the federal level, the express advocacy standard continues to apply to political speech that falls outside BCRA's very limited coverage; BCRA does not reach speech on television and radio mentioning a candidate 61 days before a general election or 31 days before a primary, nor does it cover printed political speech. *See* 11 C.F.R. § 100.22; 2 U.S.C. § 434(f)(3)(A)(i)(II)(aa).

Buckley's express advocacy saving construction, RP 4, the Superior Court purported to apply the express advocacy standard anyway. The court adopted a character attack approach to determining whether the ads constituted express advocacy: "included in [the] definition of express advocacy [is the proposition] that if in that ad the candidate's character . . . [is] attacked, the ad may be subject to only one reasonable interpretation and exhortation: to vote against a candidate." RP 5. This standard represents a stark departure from *Buckley's* clear and specific savings construction. Like the Fair Campaign Practices Act's "support or oppose" phrase—which the character attack approach was meant to save from unconstitutional vagueness—and *Furgatch's* context approach, the character attack approach is unconstitutionally vague because it leaves political speakers wholly at the mercy of the listeners' interpretation of their speech.

By adopting the character attack test, the Superior Court simply replaced one vague standard with an even vaguer and more amorphous standard. Few concepts can match the breadth and variety of meanings ascribed to the concept of character. The PDC itself recognized the sweeping, open-ended nature of the character attack standard. In its papers below, the PDC conceded candidly "[c]haracter has many definitions: public estimation or reputation; a combination of emotional, intellectual and moral qualities; or moral or ethical strength, i.e., integrity." CP 96. Nowhere, however, does the PDC indicate which of the "many definitions" of character it will apply in enforcing the Superior Court's standard. And even the very "definitions" of character offered by the PDC are themselves vague and subjective. Standing alone, the "many definitions" of character

are a powerful ground on which to reject the Superior Court's application of the character attack standard to speech about an elected state officer's official conduct.

Other sources confirm that the PDC's open-ended framing of the concept of "character" is correct. For example, Aristotle said that one attains "virtue of character" by habituating oneself to exhibit *moderate* amounts of bravery, temperance, generosity, magnificence, magnanimity, desire for "small" honors, mildness, friendliness, truthfulness, and wit. ARISTOTLE, NICHOMACHEAN ETHICS 33-37, 71-114 (Terence Irwin trans., Hackett Publishing Co. 1985). Ben Franklin pursued a "perfect Character" by charting his daily performance of thirteen "Virtues": temperance, silence, order, resolution, frugality, industry, sincerity, justice, moderation, cleanliness, tranquility, chastity, and humility. And Franklin readily admitted that his catalogue was not exhaustive: "In the various Enumerations of the moral Virtues I had met with in my Reading, I found the Catalogue more or less numerous . . . ." Benjamin Franklin, *Autobiography, in* THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 231-39 (Nina Baym et al. eds., 3d ed. 1989).

The Superior Court's application of the character attack standard in this case demonstrates the inherent vagueness of such a construction. Here, both of VEC's ads described the same conduct by Ms. Senn in her role as a public official: her decision to waive a fine in exchange for additional resources for her staff. Yet, the Superior Court found that one and not the other ad was a character attack. In the Superior Court's view, the use of a single phrase—"cover up"—metamorphosed the ad "Better" into a character

attack. Many quite reasonable viewers would hardly have detected a difference in the meaning of the two ads. Moreover, it is thoroughly unclear whether the PDC or the Superior Court would deem "Better" to be a character attack if, instead of using the phrase "cover up," the ad had said, for example, "failed to disclose," "did not disclose," or "without disclosing."

The Superior Court's conclusion is particularly problematic because the actionable phrase in the ad was a direct quotation from the *Seattle Times*. Under the Superior Court's standard, it remains unclear whether VEC would have been permitted to simply quote the *Seattle Times'* article in full. And it remains unclear whether an ad that simply quotes a news report of, for example, a conviction for bribery or perjury would also be a character attack. Such uncertainties are inherent in the Superior Court's character attack standard and vividly demonstrate that standard's inadequacy as a saving construction for vagueness.

In effect, the Superior Court has empowered the PDC to create its own sort of magic words test, but without providing speakers the list in advance. Under this regime, the PDC has the ability to exploit this standard to favor or disfavor candidates and causes at is pleasure. As this Court has observed, "bureaucracies . . . almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled, or sterilized." *WSRP*, 141 Wn.2d at 265-66. The obvious reality is that no speaker would voluntarily assume the risk of incurring liability under the statute by guessing incorrectly how the PDC or a court would interpret the speech.

Thus, for the same reason that the United States Supreme Court and this Court have required explicit

words of advocacy, that this Court and myriad others rejected *Furgatch's* context approach to express advocacy as unconstitutionally vague, and that this Court found the phrase "in support of, or in opposition to" to be unconstitutionally vague, the character attack approach to express advocacy is also unconstitutionally vague: the elastic and expansive range of meanings contained in the concept of character affords the viewer—or regulatory agency, or Court—the power to determine the import of the speech.[11] Under such a regime, self-censorship would be the only prudent course, and speakers would have to "hedge and trim" to avoid the vague shoals of the character attack standard. *Buckley*, 424 U.S. at 43 (quotation marks omitted). Indeed, under PDC's understanding of the character attack approach, the prudent course for VEC would have been to remain silent altogether on an issue of vital importance. And such self-censorship would be necessary even where a speaker simply quotes from a newspaper article.

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[11] *See Buckley*, 424 U.S. at 43 ("'[T]he supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion.'") (quoting *Thomas v. Collins*, 323 U.S. at 535); *WSRP*, 141 Wn.2d at 268-69, 271 (rejecting *Furgatch's* context approach, and observing that under that approach, although ad might appear to "attack" candidate's position on issue, "a viewer might agree with [the candidate's] stance on [the issue], and could choose to vote for him on the basis of the commercial"); *Bare*, 84 Wn.2d at 383 ("Support or oppose" standard "poses intractable problems of administration and enforcement[, including] . . . who decides and what standards are to be used in determining whether a particular communication is for or against a proposition?").

The Superior Court's character attack approach suffers from an even more fundamental defect than vagueness: it is a content-based restriction that regulates critical speech but not laudatory speech. By interpreting the statute to require disclosure by those who attack the character of candidates but not those who praise their character, the Superior Court has interpreted the statute to bear more than a passing resemblance to the infamous Sedition Act of 1798, which targeted critical political speech.[12] Both the judgment of history and of this Court show that the Superior Court's modern version of the Sedition Act must fall.

The question of the Sedition Act's constitutionality never reached the United States Supreme Court, but in *Sullivan,* the Court unanimously acknowledged that, "because of the restraint it imposed upon criticism of government and public officials," the Sedition Act has been universally condemned "in the court of history" as a blatant and shameful infringement on the freedom of speech. 376 U.S. at 276.

In *119 Vote No!*, this Court not only condemned the Sedition Act, but also struck down another provision of the Fair Campaign Practices Act because, like the Sedition Act, the provision "coerce[d] silence by force

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[12] The Sedition Act made it a crime, punishable by a $5000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." Sedition Act, 1 Stat. 596, § 2 (1798), *quoted in Sullivan*, 376 U.S. at 273-74.

of law and presuppose[d] the State will separate the truth from the false for the citizenry." 135 Wn.2d at 627 (quotation marks omitted). The provision at issue in *119 Vote No!* prohibited a person from "sponsor[ing] with actual malice . . . [p]olitical advertising that contains a false statement of material fact." *Id.* at 620 n.1. The Court first found that the prohibition infringed upon constitutionally protected speech because it was not limited to defamatory speech. *Id.* at 627-28. The Court then held that the State's proffered justifications for the regulation—to "foster an informed electorate" and to "regulate maliciously false speech"—were not "compelling," as required by the First Amendment. *Id.* at 628-31. Rather, the Court concluded that "the State's claimed compelling interest to shield the public from falsehoods during a political campaign is patronizing and paternalistic." *Id.* at 631-32.[13]

Finally, we note that this Court's decision in *WSRP* does not support the Superior Court's approach. In discussing the ads at issue in *Furgatch*, this Court emphasized that "[t]he pivotal question [in *Furgatch*] was what the reader was asked to do by the phrase 'DON'T LET HIM DO IT.'" *WSRP*, 141 Wn.2d at 270. Because this ad "clearly exhorted voters . . . to vote against" the candidate, it was deemed to be express advocacy. *Id.* at 271. By contrast, the only action urged by the ads aired by VEC was for the viewer to

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[13] In a similar vein, the State Court of Appeals has recently struck down as a content-based restriction the revised version of the false political advertising provision that the Court invalidated in *119 Vote No!*, in part because the revised version prohibited false statements against a candidate, but left unregulated false but supportive statements by a candidate or her agent. *Rickert v. PDC*, 129 Wn. App. 450, 119 P.3d 379 (2005), *petition for review pending*, Case No. 77769-1.

"log on to learn more" from a website. Indeed, neither the ad nor the website contained an exhortation of any kind, let alone one to vote against Ms. Senn. Thus, these ads were clearly not express advocacy.

To be sure, the Court in *WSRP* observed, "[W]hen a candidate's character . . . [is] attacked, the ad may be subject to only one reasonable interpretation: an exhortation to vote against the candidate," 141 Wn.2d at 270. But again, this statement related to the ad in *Furgatch* that impugned the personal moral standing of President Carter with the line: "His meanness of spirit is divisive and reckless McCarthyism at its worst." *WSRP,* 141 Wn.2d at 269. The ad in *Furgatch* was a quintessential *ad hominem* attack. But VEC's ads contained no commentary on Ms. Senn's personal morality. Rather, the ad spoke exclusively to her performance of her official responsibilities, a fact underscored by subsequent legislation addressing the issues discussed in the ad.[14]

Furthermore, at no time did the Court suggest use of this test as a cure for an otherwise vague statute. Quite to the contrary, as discussed above, the Court rejected *Furgatch's* context approach to express advocacy because, by not requiring *explicit* words of advocacy, *Furgatch* fails to meet *Buckley's* concern that regulations of election-related speech not cede control over the meaning of such speech to "regulatory and judicial assessment[s]." *WSRP*, 141 Wn.2d at 268. After reaching this conclusion, the

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[14] Although the legislature passed a statute aimed at foreclosing Ms. Senn or subsequent Insurance Commissioners from diverting fines from the State's general fund, Engrossed Senate Bill No. 6039 (1997), Governor Locke vetoed the bill on the ground that passage of the bill alone was sufficient to "send a message" to Ms. Senn. CP 400.

Court proceeded to another reason why *Furgatch's* context approach should not control the outcome in *WSRP: even if* the Court were to apply *Furgatch's* context approach, it would reach the same outcome because the two cases were "factually distinguishable." In particular, the Court said, "Unlike the ad in *Furgatch*, the . . . ad [in *WSRP*] does not attack the candidate's character but rather his stand on criminal law issues." *WSRP*, 141 Wn.2d at 270. Because the Court did not need to analyze the ad under the character attack approach to resolve the case—and more importantly, because the Court had already rejected the larger *Furgatch* framework, of which the character attack approach was a part—the Superior Court was not bound to apply the character attack approach, and, indeed, under *Buckley* and the primary holding of *WSRP*, it was prohibited from doing so.

3. VEC's ads did not constitute express advocacy and therefore VEC is not subject to the PDC's regulatory authority.

By relying upon its character attack standard, the Superior Court erroneously concluded that the ad entitled "Better" was express advocacy, and that therefore VEC is subject to PDC regulation of its political speech. RP 5-6. According to the decisions of the United States Supreme Court and this Court, a communication constitutes express advocacy only if it includes *"explicit words* of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 43 (emphasis added); *see also id.* at 77, 80; *MCFL*, 479 U.S. at 249; *WSRP*, 141 Wn.2d at 268-69. In other words, a communication is express advocacy only if it contains a "call for action" in the form of an "exhortation to vote for or against a specific

candidate." *Id.* at 267, 273; *see also MCFL*, 479 U.S. at 249 ("*Buckley* . . . distinguish[es] discussion of issues and candidates from more pointed exhortations to vote for particular persons."). This Court emphasized that the express advocacy standard "is an exacting one, with any doubt whether a communication is an exhortation to vote for or against a particular candidate to be resolved in favor of the First Amendment freedom to freely discuss issues." *WSRP*, 141 Wn.2d at 265.

Under the *WSRP* standard, neither of VEC's ads qualifies as express advocacy. Neither ad contained any of *Buckley's* magic words, nor other similar words, such as "election," "campaign," "attorney general," or "oppose." The ads' only call to action was an invitation to visit a webpage, which in turn contained no explicit words of advocacy of defeat of Ms. Senn. Indeed, neither the ads nor the webpage even made reference to Ms. Senn's candidacy. *See Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 198 (5th Cir. 2002) (connection between ads and website referenced in ads was "too tenuous" to qualify ads as express advocacy); *cf. WSRP*, 141 Wn.2d at 270-71 (critical ad imploring viewers to "[t]ell" candidate various things relating to candidate's stand on particular issue was not exhortation to vote against candidate).

Moreover, the fact that VEC's ads were critical of or skeptical toward Ms. Senn's performance as Insurance Commissioner does not mean they expressly advocated her defeat. Such a rule would sweep far too broadly to be consistent with the First Amendment. As the Court said in *WSRP*, "The fact that [an ad] was partisan, negative in tone, and appeared prior to the election" does not mean that the ad is express advocacy. 141 Wn.2d at 273; *see*

also Moore, 288 F.3d at 198 & n.15 ("[F]avorable statements about a candidate do not constitute express advocacy, even if the statements amount to an endorsement of the candidate."); *Kansans for Life. Inc. v. Gaede*, 38 F. Supp. 2d 928, 936 (D. Kan. 1999) ("[T]he ad does not expressly advocate the election or defeat of a candidate or direct the public to take action for or against an identified candidate . . . [even though] the ad discusses an issue while disparaging one candidate and commending his opponent.").

* * * *

Respectfully submitted this 12th day of December, 2005.

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APPENDIX H

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 77724-1

VOTERS EDUCATION COMMITTEE, *et al.*,
Plaintiffs / Appellants,

v.

STATE OF WASHINGTON *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, *et al.*,
Defendants / Respondents,

and

DEBORAH SENN,
Intervenor.

REPLY BRIEF OF APPELLANTS VOTERS EDUCATION COMMITTEE *et al.*

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* * * *

A. The PDC Misinterprets and Misquotes *McConnell*.

The PDC argues that the statutory definition of "political committee" was revived by the United States Supreme Court's recent decision in *McConnell*, which held, according to the PDC, "that the particular terms 'support' and 'oppose' are not vague." PDC Br. at 20. In support of this assertion, the PDC quotes the following passage from *McConnell*: "The words 'promote, 'oppose,' 'attack,' and 'support,' clearly set forth the confines within which *political speakers* must act in order to avoid triggering the provision" of the BCRA. PDC Br. at 20 (quoting *McConnell*, 540 U.S. at 170 n.64) (emphasis added). But this is *not* what the *McConnell* Court said. The PDC, distressingly, misquotes *McConnell*, inserting the word "*political*" to modify "speakers" in place of the words "potential party," which the *McConnell* Court actually used.[1]

The difference is crucial. The provision referenced in the passage quoted (rather, misquoted) by the PDC was one of BCRA's restrictions on so-called soft-money contributions to *political parties*. Specifically, the provision "prevents donors from contributing nonfederal funds to state and local party committees to help finance" party advertising that "'refers to a

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[1] The passage of *McConnell* that the PDC quotes actually reads: "The words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential *party speakers* must act in order to avoid triggering the provision. These words provide explicit standards *for those who apply them* and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." 540 U.S. at 170 n.64 (quotation marks omitted) (emphases added).

clearly identified candidate for Federal office' and 'promotes,' 'supports,' 'attacks,' or 'opposes' a candidate for that office." *McConnell*, 540 U.S. at 161-62 (quoting 2 U.S.C. §§ 431(20)(A)(i)-(iv)). Obviously, an advertisement by a political party that "refers to a clearly identified candidate" can be *presumed* to "support" the party's own candidate and to "oppose" the candidates of competing political parties. A political party, unlike a private speaker, simply needs no more specific guidance to know what is prohibited. Indeed, the *McConnell* Court said as much. Immediately following the passage misquoted by the PDC, the Court said:

> [A]ctions taken by political parties are *presumed* to be in connection with election campaigns. *See Buckley*, 424 U.S. at 79, 46 L. Ed. 2d 659, 96 S. Ct. 612 (noting that a general requirement that political committees disclose their expenditures raised no vagueness problems because the term "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" and thus a political committee's expenditures "are, by definition, campaign related").

Id. at 170 n.64 (emphasis added).

The Court's citation to *Buckley* is especially illuminating. The provision at issue there required disclosure by candidates and "political committees" of expenditures "for the purpose of . . . influencing" a federal election or nomination. "Political committee," in turn, was defined to include any group of persons that makes aggregate expenditures exceeding $1,000 within a year, and thus "*could be interpreted to reach groups engaged purely in issue discussion.*" 424 U.S.

at 79 (emphasis added). To avoid the vagueness problem inherent in determining whether the expenditures of such groups were designed to influence an election, the *Buckley* Court narrowly construed the term "political committee" to exclude them, and to encompass only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. Expenditures of such organizations "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*

Thus the *Buckley* Court eliminated the regulation's vagueness problem by construing it to reach only those groups for which the regulation would not be vague. The regulation at issue in *McConnell* reached only political *party* speakers, not all *political* speakers (as the PDC represents), and it was upheld only because it was not vague as to parties. Here, in contrast, the statute encompasses all political speakers, not just political parties with intimate connections to their nominees.

* * * *

Respectfully submitted this 20th day of March 2006.

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APPENDIX I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 77724-1

VOTERS EDUCATION COMMITTEE, *et al.*,
Plaintiffs / Appellants,

v.

STATE OF WASHINGTON *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, *et al.*,
Defendants / Respondents,

and

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* * * *

ARGUMENT

1. The amicus brief of the CLC argues that the federal tax status of VEC "is a compelling fact in this case." CLC Br. at 5. The CLC offers the following syllogism: (1) all tax-exempt "political organizations" under 26 U.S.C. § 527 ("527 organizations"), a status restricted to organizations whose primary purpose is "influencing or attempting to influence" elections, are necessarily "political committees" under *State* law; (2) VEC is a registered 527 organization; therefore, (3) the VEC is a political committee under State law. This seemingly tight syllogism falls apart, however, in its major premise, which is demonstrably false.

The Federal Election Commission ("FEC") has recognized that there are two ways for political speakers to influence elections: (1) speakers may attempt to influence elections directly through express advocacy, which will result in their being treated as "political committees" under *federal* law, or (2) speakers may engage in issue advocacy, which will not result in their being treated as federal political committees. But "it has been the administrative practice of the FEC since *Buckley* to deny jurisdiction over independent organizations that do not engage in any express advocacy." Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1006 (2005). The FEC has taken this position in full knowledge of the fact that these entities, by definition, operate "primarily for the purpose of . . . influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office

or office in a political organization." § 527(e)(1)-(2).[1] Both before and after the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93, 24 S. Ct. 619, 157 L. Ed. 2d 491 (2003), political speakers attempting to influence federal elections have been able to rely upon this clear guidance.

The CLC suggests that the FEC will treat political organizations with the "major purpose" of influencing elections as political committees. CLC Br. at 10 n.5. But, in fact, the FEC regulations confine the definition of a "political committee" to entities that engage in express advocacy. 11 C.F.R. § 100.5(a).[2]

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[1] The significance that the CLC attaches to VEC's status as a 527 organization is misguided also because § 527 sweeps much more broadly than either federal or Washington election laws, including extending to those organizations engaged solely in issue advocacy. IRS Private Letter Ruling ("PLR") 9652026; PLR 9808037. Section 527 encompasses not only organizations operated "for the purpose of . . . accepting contributions or making expenditures . . . for the function of influencing . . . [the] election . . . of any individual to any . . . public office," § 527(e)(1) & (2), but also those that seek "to influence the selection, nomination, election or appointment of any individual to any . . . office in a political organization" (which would be the political party bodies under RCW 42.17.020(6)(b) and (c)) or the "appointment of any individual to any Federal, State, or local public office." *Id.* The latter two categories—groups seeking to influence the filling of positions in *political organizations* and groups seeking to influence *appointments* to public offices (such as federal judicial appointments, *see* Ann. 88-114, 1988-37 I.R.B. 26)—fall within § 527 but outside RCW 42.17.020(38), which covers only "candidate[s]" for "election to public office." See RCW 42.17.020(9) (defining "candidate").

[2] The regulation defines political committees as those entities that "receive[s] contributions aggregating in excess of $ 1,000 or which make[] expenditures aggregating in excess of $ 1,000 during a calendar year is a political committee." 11 C.F.R. § 100.5(a). The term "expenditure" is, in turn, understood to

The FEC *expressly declined* to depart from this standard in a 2004 rulemaking procedure when it was urged to adopt the "major purpose" test posited by the CLC. 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004).[3] For this reason, the CLC recently decried the FEC's creation of a regulatory "loophole" for 527 organizations. 152 CONG. REC. H1526-27 (daily ed. Apr. 5, 2006) (letter of Apr. 4, 2006, from the CLC *et al.* to all Representatives). In light of the FEC's approach, CLC urged passage of a bill in the United States House of Representatives that would close the alleged "loophole" and require the FEC to treat most 527 organizations, including those that refrain from

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reach only expenditures for express advocacy. *See* MASON Polasky & Charles, *supra*, at 1006 ("It has been the administrative practice of the FEC since *Buckley* to deny jurisdiction over independent organizations that do not engage in any express advocacy."); *527 Reform Act of 2005: Hearings on S.271 Before the S. Comm. on Rules and Administration*, 151st Cong. 1 (Mar. 8, 2005) (testimony of David M. Mason, Commissioner, Federal Election Commission). The other standards for political committee status, which apply to PACs and candidate committees, have no bearing here since it is clear that the VEC is not one of the enumerated entities. *See* 11 C.F.R. § 100.5(b)-(g).

[3] The FEC did claim for itself a residual authority under *Buckley* to apply the major purpose test. 69 Fed. Reg. at 68,065. But the FEC has sparingly invoked this power, as the CLC implicitly recognizes with its charge that the FEC has created a regulatory loophole for 527 organizations. And on the rare occasion when the FEC has applied the major purpose test, it appears to have done so when the 527 organization engaged in express advocacy. *See, e.g.*, Compl. for Declaratory, Injunctive, and Other Appropriate Relief, at 37, *FEC v. Club for Growth, Inc.*, No. 05-1851, (D.D.C. Sept. 19, 2005) (pointing to expenditure for an ad that exhorted listeners to action by stating that it was their "mission" to elect a proponent of tax cuts and that "only a tax cutter like Ric Keller can help you accomplish your mission").

engaging in express advocacy, as political committees. The fact that legislation is required to bring about this result confirms that the FEC currently does not treat all 527 organizations as political committees.[4]

2. The CLC invokes *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), contending that, even if the disclosure regulation here is vague as applied to individuals, there are "no vagueness concerns with regard to *political organizations* such as the VEC." CLC Br. at 9-10 (original emphasis). As a threshold matter, we note that the FEC has rejected the CLC's reading of *Buckley*—if the FEC agreed with the CLC, then it would treat all 527 organizations as political committees. The CLC interpretation is plainly incorrect, for the CLC wants to borrow *Buckley*'s holding with respect to "political committees" as defined in the Federal Election Campaign Act's ("FECA") disclosure provision and apply it to the "political committee[s]" defined in RCW 42.17.020(38). But the CLC ignores the express limitation on the definition of "political committees" that *Buckley* deemed essential to its holding. The Supreme Court held that FECA's disclosure provision was rescued from unconstitutional vagueness only insofar as the "lower courts have construed the words 'political committee' *more narrowly* . . . [to] *only* encompass organizations [1] that are *under the control of a candidate* or [2] the *major purpose* of which is the nomination or *election of a candidate*." 424 U.S. at 79 (emphases added). Thus, *Buckley* essentially limited the disclosure requirement's reach

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[4] The bill passed the House, but the Senate has yet to act upon this measure. *See* 527 Reform Act of 2006, H.R. 513, 109th Cong. (as passed by House, Apr. 5, 2006).

to candidates own committees[5] and to committees dedicated to electing a specific candidate. The types of committees identified in *Buckley*—committees devoted to the "election of a candidate"—exist solely to elect a specific candidate. Thus, it was quite natural for the Court to assume that such candidate-specific organizations are by definition supporting or opposing candidates when they engage in political speech. In this regard, the Court's reasoning is similar to its analysis in *McConnell*, where a similar presumption was applied to political parties. *See* VEC Reply Br. at 9-11. By contrast, 527 organizations can engage in a multiplicity of conduct that includes genuine issue advocacy, as the IRS itself has recognized. *See supra* note 1.

Neither of *Buckley*'s limitations fits VEC. It is undisputed that VEC is not "under the control of a candidate." Nor is the VEC's "major purpose . . . the *election* of a candidate." Thus, the VEC is not akin to the candidate committees addressed in *Buckley*. That takes VEC outside the narrow confines of *Buckley*'s presumption.

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6. Finally, the CLC's exclusive focus on *federal* statutes and judicial decisions obscures the fact that this case is about the meaning of a state regulatory statute and the decisions of this Court construing it authoritatively. Specifically, in *Bare v. Gorton*, this Court established that the key phrase in the definition of "political committee"—"in support of, or in opposition to"—is unconstitutionally vague on its face. 84 Wn.2d 380, 383-87, 526 P.2d 379 (1974). The

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[5] This category appears to be the same as the "authorized committee" defined in RCW 42.17.020(3).

CLC fails to acknowledge this important decision, as did the PDC. Subsequently, in *Washington State Republican Party v. Washington State Public Disclosure Commission*, this Court embraced *Buckley*'s express advocacy narrowing construction for vague regulations of election-related speech, and further directed that only speech that contained explicit words of advocacy would qualify as express advocacy. 141 Wn.2d 245, 263-69, 4 P.3d 808 (2000). Therefore, this Court's decisions have made clear that the term "political committee" under Washington law reaches only those persons using explicit words of advocacy. VEC governed itself strictly in accord with this Court's teaching; it is undisputed that VEC's ads did not call for any action for or against Ms. Senn's candidacy. Thus VEC was not a political committee under Washington law, *as authoritatively construed by this Court*.

The CLC attempts to avoid this conclusion by steadfastly ignoring this Court's decision in *Bare* and focusing exclusively on federal courts' interpretation of federal laws that were amended in recent years to eliminate the vagueness of prior campaign finance statutes, such as the FCPA. But even if this Court should choose now to revisit and modify the holding in *Bare*, that decision was nevertheless this Court's authoritative construction of state law at the time VEC engaged in the speech that the PDC now attempts to punish with a fine. Surely, speakers in Washington State are entitled to rely upon this Court's interpretation of state law without having to divine whether federal courts' interpretation of federal statutes would cause this Court to reassess its interpretation of state law. The First Amendment compels the courts to "take[] special care to insist on fair warning when a statute regulates expression."

Marks v. United States, 430 U.S. 188, 196, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (citing *Buckley*, 424 U.S. at 40-41). A speaker is entitled to rely on a governing judicial decision that narrowed the "sweeping language" of a law regulating speech. *Id.* at 195; *see also id.* (Defendants, "engaged in the dicey business of marketing films subject to possible challenge, had no fair warning that their products might be subjected to the new standards."); *id.* at 191-92 (holding that Supreme Court's new obscenity standard, which departed from prior precedent in a way detrimental to defendant, could not be applied against defendant because the principle of a "right to fair warning" on which the Ex Post Facto Clause is based "is protected against judicial action by the Due Process Clause . . . ."); *Burgess v. Salmon*, 97 U.S. 381, 385, 24 L. Ed. 1104 (1878) (state cannot evade Ex Post Facto Clause by clothing its legal prohibitions in form of civil sanctions) (refusing to apply retroactive tax increase on tobacco).

This principle has special importance when the state regulates speech with legal sanctions because of the problem of chilling effect that is anathema to the First Amendment. If a decision like *Bare v. Gorton*, which authoritatively limits statutory language that would otherwise be unconstitutionally vague—and that would otherwise chill protected speech—can be overturned and a new, more expansive speech regulation applied to a speaker who had taken refuge in the safe harbor provided by the earlier case, then the chilling effect originally induced by the vague statute was never dissipated. No speaker would rely on a judicial decision that ruled a speech regulation unconstitutional if that decision could be overturned and the resurrected regulation could be applied, without warning, to any speaker in a future state

enforcement action. Free speech requires—and the First Amendment mandates—more "breathing room" than that. *Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 620, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003); *New York Times v. Sullivan*, 376 U.S. 254, 272, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

In light of this precedent, even if the Court were to abandon its decision in *Bare v. Gorton* and adopt the CLC's interpretation of political committee, it should do so on a purely prospective basis that would not permit the PDC to impose a fine upon the VEC.

Respectfully submitted this 12th day of May 2006.

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APPENDIX J

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 77724-1

VOTERS EDUCATION COMMITTEE, *et al.*,
Plaintiffs / Appellants,

v.

STATE OF WASHINGTON *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, *et al.*,
Defendants / Respondents,

and

DEBORAH SENN,
Intervenor.

MOTION FOR RECONSIDERATION OF APPELLANTS VOTERS EDUCATION COMMITTEE *et al.*

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* * * *

A. THE COURT'S RULING THAT THE FCPA'S "SUPPORT OR OPPOSE" LANGUAGE IS NOT UNCONSTITUTIONALLY VAGUE CONFLICTS WITH *BUCKLEY v. VALEO*, *McCONNELL v. FEC* AND THEIR PROGENY.

In upholding the definition of "political committee," the majority in this case emphasized that the "United States Supreme Court has upheld the words 'support' and 'oppose' as sufficiently precise to withstand a vagueness challenge in *McConnell*." Slip op. 20 (quoting *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003)). *See also id.* at 20 n.9 (rejecting the dissent's analysis of *McConnell*). But as the dissenting opinion pointed out, the majority's own quotation from *McConnell* reveals that the Supreme Court there expressly limited its discussion to "'potential party speakers,'" slip op. at 20, a distinction that "makes all the difference," because "[c]andidates and the political parties who support them for public office may be subjected to broader regulation in the interests of disclosure." Dissent slip op. at 10.

The majority misapprehends both *McConnell* and the statutory provision it was discussing in the quoted passage. The *McConnell* Court, in the very passage that the majority quotes here, specified that it was addressing the application of the statute to "*party* speakers." 540 U.S. at 170 n.64 (emphasis added). The *McConnell* Court was analyzing the definition of "federal election activity" under Title I of the Bipartisan Campaign Reform Act ("BCRA"), which was "Congress' effort to plug the soft-money loophole." *Id.* at 133. Section 323(a) of BCRA "takes *national parties* out of the soft-money business," and the "remaining provisions of new FECA § 323(b)

reinforce the restrictions in § 323(a) . . . [by] prevent[ing] the wholesale shift of soft-money influence from *national to state party* committees." *Id.* at 133-34 (emphasis added). Obviously, an advertisement by a *political party* that "refers to a clearly identified candidate" can be *presumed* to "support" the *party's* own candidate and to "oppose" the candidates of the other *political parties*. *See id.* 540 U.S. at 161-62 (quoting 2 U.S.C. § 431(20)(A)(i)-(iv)). That is what political parties are for, after all, and a party speaker, unlike a private speaker, needs no more specific guidance to know what the law requires. Indeed, the United States Supreme Court made this precise point in the very same footnote that the majority cites, in the sentence immediately following the passage that the majority quotes:

> [A]ctions taken by political parties are *presumed* to be in connection with election campaigns. *See Buckley*, 424 U.S. at 79 (noting that a general requirement that political committees disclose their expenditures raised no vagueness problems because the term "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," and thus a political committee's expenditures "are, by definition, campaign related").

540 U.S. at 170 n.64 (emphasis added).

The *McConnell* Court's citation to *Buckley* is revealing because, as the Court's own parenthetical explains, the *Buckley* Court eliminated the regulation's vagueness problem by construing it to reach only those groups for which the regulation would not be vague—groups controlled by or openly devoted to election of a particular candidate. The regulation at

issue in *McConnell* by its terms reached only political *party* speakers, not all political speakers, and it was upheld, as the Court made clear, only because it was not vague as to political parties. In the present case, in contrast, the statute encompasses all political speakers. *See San Jose Silicon Valley Chamber of Commerce PAC v. San Jose*, No. 06-04252, 2006 U.S. Dist. LEXIS 94338, at *26-27 (N.D. Cal. Sept. 20, 2006) ("The Supreme Court's vagueness discussion upholding the BCRA's use of the words 'promote,' 'oppose,' 'attack,' and 'support' did so in the context of speech by *political parties*. *McConnell*, 540 U.S. at 170. . . . The Supreme Court's focus, then, was on political parties and their speakers. Due to the presumption that political parties act in connection with political campaigns, it was reasonable that their members of 'ordinary intelligence' could ascertain whether party speech promoted, opposed, attacked, or supported a candidate.") (original emphasis).

The majority's vagueness analysis is therefore in conflict with *Buckley*, *McConnell*, and their progeny. In *McConnell*, the Court merely rejected the view, often ascribed to *Buckley*, that the First Amendment itself establishes the line between express advocacy and issue advocacy, flatly prohibiting government from regulating the latter. This issue is not relevant here because the VEC does not contend that the State is barred from regulating election-related speech other than express advocacy. Rather, the VEC argues only that the State, in its statutory definition of a "political committee," has not exercised its power to regulate election-related speech with the constitutionally required specificity. The *McConnell* decision did not relieve government of this obligation. Indeed, the *McConnell* Court expressly approved of *Buckley* insofar as it saved an otherwise vague

regulation from invalidity by construing it to reach only express advocacy: "Our adoption of a narrowing construction [in *Buckley*] was consistent with our vagueness and overbreadth doctrines." 540 U.S. at 192 n.75.[1]

In the aftermath of *McConnell*, courts have acknowledged that *Buckley*'s express-advocacy standard remains good law and continues to provide an appropriate saving construction for otherwise unconstitutionally vague regulations of election-related speech. *See, e.g., Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 664-66 & n.7 (5th Cir. 2006) ("*McConnell* does not obviate the applicability of *Buckley*'s line-drawing exercise where, as in this case, we are confronted with a vague statute. The flaw in the [statute] is that it *might* be read to cover issue advocacy. Following *McConnell*, that uncertainty presents a problem not because regulating such communications is *per se* unconstitutional, but because it renders the scope of the statute uncertain. To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley*'s limiting principle") (original emphasis); *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004) ("while the *McConnell* Court disavowed the theory that 'the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy,' it nonetheless left intact the ability of courts to make

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[1] The *McConnell* Court also imposed a demanding standard for clarity in a law regulating speech: "electioneering communication" was extensively and precisely defined. *See* 540 U.S. at 194, 203-05. And even that was not sufficient to save the law when it was held unconstitutional as applied to several political ads in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2659, 2664-67, 2669 n.7 (2007). The definition at issue here does not even come close to this standard.

distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth"); *ACLU v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) ("*McConnell* left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest."); *San Jose Silicon Valley Chamber of Commerce PAC v. San Jose*, 2006 U.S. Dist. LEXIS 94338, at *26-27. The majority's reading and application of *McConnell* is in conflict with these decisions, and rehearing is therefore appropriate.

B. APPLICATION OF THIS COURT'S REINTERPRETATION OF ITS DECISIONS IN *WSRP v. PDC* AND *BARE v. GORTON* TO APPELLANT VEC WOULD CONSTITUTE RETROACTIVE REGULATION OF SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

The First Amendment mandates that courts "take[] special care to insist on fair warning when a statute regulates expression." *Marks v. United States*, 430 U.S. 188, 196 (1977) (citing *Buckley v. Valeo*, 424 U.S. 1, 40-41 (1976)). In particular, a speaker is entitled to rely on a governing judicial decision that narrowed the "sweeping language" of a law regulating expression. *Id.* at 195. *See also id.* at 191-93 (holding that Supreme Court's new obscenity standard, which departed from precedent in a manner detrimental to defendant, could not be applied to defendant because the principle of a "right to fair warning" is "protected against judicial action by the Due Process Clause").

In particular, the retroactive application of a new rule regulating election speech on a context basis, which was forbidden under *Buckley*, to speech that has already taken place under the prior regulatory regime denies the speaker fair warning and due process. *Elections Bd. v. Wisconsin Manufacturers and Commerce*, 597 N.W.2d 721, 736 (Wisc. 1999) ("We conclude that under the circumstances of this case, WMC, when it broadcast its advertisements, had insufficient warning that the ads could qualify as express advocacy under Wisconsin's campaign finance law. The Board's after-the-fact attempt to apply a context-oriented standard of express advocacy must fail, since, in effect, it was an unfair attempt at retroactive rule-making.").

This Court's decisions in *Washington State Republican Party v. Washington State Public Disclosure Commission*, 141 Wn.2d 245, 4 P.2d 808 (2000), and *Bare v. Gorton*, 84 Wn.2d 380, 526 P.2d 379 (1974), were authoritative constructions of the State's Fair Campaign Practices Act ("FCPA") in 2004 when VEC engaged in the speech that the PDC now seeks to punish. The VEC was therefore entitled in 2004 to rely on this Court's prior interpretations of State law, as implemented by the PDC during the 2004 election, without having to guess whether the federal courts' interpretation of federal statutes would at some future time move this Court to reassess its interpretation of State laws.

In *WSRP*, this Court rejected the context-based analysis adopted in *FEC v. Furgatch*, 807 F.2d 857, 863 (9th Cir. 1987). This Court also adopted *Buckley*'s distinction between express advocacy and issue advocacy and *Buckley*'s "narrow view of express advocacy." *Washington State Republican Party v.*

Washington State Pub. Disclosure Comm'n, 141 Wn.2d at 263-66, 4 P.2d at 818-20 (2000). The *WSRP* Court accordingly embraced the "magic words" test, *id.* at 259, 4 P.2d at 816, and, as the majority itself notes in its opinion here, it ruled that "'*Buckley* requires the definition of election-related speech to be sharply drawn.'" Slip op. at 17 (quoting *WSRP*, 141 Wn.2d at 266). Therefore, the "support or oppose" definition of speech that triggers the restrictions of the FCPA here is constitutionally acceptable under *WSRP* only if the saving construction from *WSRP* is applied.[2]

In this case the majority has now abandoned the express advocacy rule it established in *WSRP* because it believes that the *McConnell* Court rejected as "functionally meaningless" the *Buckley* distinction between express advocacy and issue advocacy. Slip op. at 19, citing *McConnell*, 540 U.S. at 193.

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[2] Indeed, in the wake of *McConnell v. FEC*, 540 U.S. 93 (2003), the Attorney General of Washington urged the PDC to change its rules to take account of that decision and the degree to which it modified *Buckley v. Valeo*, 424 U.S. 1 (1976), the case that this Court followed in *WSRP*. The PDC took up that issue at its July 23, 2004 hearing. *See* Minutes of Special Meeting of the PDC (July 23, 2004), *available at* the PDC's website, www.pdc.wa.gov. The PDC rejected the request that it modify its rules, and stated that it would adhere to *WSRP* and the distinction between express advocacy and issue advocacy until such time as the Washington Legislature or this Court had occasion to revisit *WSRP* in light of *McConnell*. *Id.* at 2-3. Therefore, during the 2004 election, the PDC deliberately chose to continue to regulate only express advocacy pursuant to the *WSRP-Buckley* rule as set forth in PDC Interpretation 00-04 (Sept. 26, 2000), *available at* the PDC's website, rather than to broaden its regulatory regime under *McConnell*. Accordingly, in this very enforcement action against the VEC, the PDC itself applied only the express advocacy rule to VEC's 2004 speech.

Emphasizing that the *McConnell* Court "upheld the words 'support' and 'oppose' as sufficiently precise to withstand a vagueness challenge," slip op. at 20 (citing *McConnell*, 540 U.S. at 170 n.64), the majority departed from *WSRP* and held that former RCW 42.17.020(33) was not unconstitutionally vague. Slip op. at 20, 26. The dissenting Justices noted this departure from *WSRP* and opined that "we must judge the VEC's advertisement here based on controlling law at the time of the speech. The VEC spoke under the previous version of the statute and relied on the explicit words test that we articulated in *WSRP*." Dissent slip op. at 16. *See also id.* at 17. The majority opinion does not dispute that its holding departs from the *WSRP* express advocacy rule on which the VEC reasonably relied when it broadcast its ads in 2004.

The majority's opinion is also in conflict with the Court's decision in *Bare v. Gorton*, which considered the constitutionality of a provision of the FCPA imposing spending limits on "election campaign" expenditures. *See* Initiative No. 276 § 14 (1973) (formerly codified at RCW 42.17.140). "Election campaign," in turn, was defined as "any campaign *in support of or in opposition to*, a candidate for election to public office." *Id.* at § 2(11) (codified at RCW 42.17.020(18)) (emphasis added). This Court struck the statute down as unconstitutionally vague, because the definition of election campaign posed "substantial and unresolved issues of meaning and application," *Bare*, 84 Wn.2d at 385. Specifically, the *Bare* Court was concerned that the statute left unresolved "who decides and what standards are to be used in determining whether a particular communication is for or against a proposition?" *Id.* at 383. In the present case, although former RCW

42.17.020(33) defines "political committee" using precisely the same language at issue in *Bare*—"*in support of or in opposition to*, any candidate," the majority nonetheless held that *Bare* is inapposite on three grounds.

First, the majority observes that "we did not consider the definition of 'political committee' in *Bare*." Slip op. at 21. This is correct, but irrelevant. *Bare* considered identical language in another subparagraph of the very same section of the very same campaign-finance statute, used to define another party subject to the statute's limitations. Familiar canons of construction impose a "presumption that the same words repeated in different parts of the same statute have the same meaning." *Environmental Def. v. Duke Energy Corp.*, 127 S. Ct. 1421, 1438 (2007). The majority offers no basis for overcoming that presumption here and instead finding the identical statutory test to be unconstitutionally vague in one definition but acceptably specific in another.

Second, the Court deems *Bare* inapposite because "the phrase 'in support of, or in opposition to, a candidate,' did not appear anywhere in former RCW 42.17.140 (1973), the challenged statute that we did invalidate in *Bare*." Slip op. at 21. With all due respect, the Court is mistaken. The particular provision that was invalidated was part of the FCPA, Initiative No. 276 § 14 (1973) (formerly codified at RCW 42.17.140), and the definition of "election campaign" that section 14 employed—and that led to the ruling that the provision was unconstitutionally vague—was presented in section 2(11) (codified at RCW 42.17.020(18)). Those are two parts of the same statute, and the separation of the two subprovisions is merely an artifact of the general legislative

practice of gathering all definitions for a given act together in one place.

As the majority itself seems to recognize (in its own quotation from *Bare*, slip op. at 21), the statute struck down in *Bare* as vague used this same troubling definition, which the *Bare* Court paraphrased as "for and against"—to wit, "Section 14(2) establishes limits for every election campaign for and against" any proposition or candidate. 84 Wn.2d at 383, 526 P.2d at 380. The majority concedes that this was one of the factors that led to the holding that former RCW 42.17.140 was unconstitutionally vague—indeed, it was the very first factor mentioned by the *Bare* Court—but dismisses *Bare*'s holding nonetheless because the Court there also identified five additional factors that pointed to the same result. Slip op. at 22. But the fact that the provision invalidated in *Bare* was unconstitutionally vague in more than one respect does not make the "for and against" statutory formulation that *Bare* expressly struck down any less vague.[3]

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[3] In a footnote, the Court postulates that there is "a meaningful distinction [that] can be drawn between using 'for or against' while analyzing a statute that does not include 'in support of or in opposition to' and analyzing 'in support of or in opposition to' directly." Slip op. at 22 n.11 (responding to the Dissent, slip op. at 13-14). Respectfully, we cannot imagine what the distinction could be, insofar as "for" is a synonym for "in support of" and "against" is a synonym for "in opposition to" (which is no doubt why the Court in *Bare* itself used the shorthand "for or against" when discussing the statutory formulation). More important, and dispositive here, the premise of the majority's distinction is false: as demonstrated above in text, the identical phrase "in support of, or in opposition to" *was* employed in the statute that was at issue in *Bare*, it was merely codified, as is the near-universal practice, in the "definitions" section of the statute.

Third, and finally, the Court notes that "*Bare* concerned expenditure limits rather than disclosure requirements." Slip op. at 22. This is another distinction that does not matter. The majority acknowledges that the First Amendment's principles apply to disclosure requirements as well as spending limits, see slip op. at 12 (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)), and it is undisputed that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (striking down a disclosure requirement). *See also O'Day v. King County*, 109 Wn.2d 796, 810, 749 P.2d 142, 150 (1988).

The upshot of the majority's reading of *WSRP* and *Bare* is that these earlier decisions did not focus precisely on the specific FCPA section at issue here, and application of the Court's decision here to the VEC's 2004 ad is therefore not technically "retroactive." As discussed above, we believe this is wrong, but there is a larger point to be made. With respect to an alleged violation of most types of statutory restrictions, when a defendant claims that he acted in reasonable reliance on a prior judicial interpretation of the statute, it is entirely proper to test that claim with a careful exegesis of the prior case to determine its holding with technical precision, and to place the risk of error on the defendant. For most regulatory purposes, persons with fair notice may be required either to steer clear of legal risk or accept the consequences even if the scope of the restriction is reasonably debatable.

But where core First Amendment activity is being restricted, as in this case, the situation is very different. Because speakers have an affirmative constitutional right to speak, the government cannot

require them to stand silent until the law becomes clear.[4] *Buckley* made precisely this point, demanding an exceptional degree of clarity because the constitutional cost is unacceptable when speakers must steer clear of permissible conduct to avoid risk. 424 U.S. at 41 & n.47 (demanding exceptional "precision of regulation . . . in an area so closely touching our most precious freedoms.").

Where a law burdens precisely the type of speech that the First Amendment values most highly, the issue is not whether a prior holding squarely reached and construed the precise statutory speech restriction at issue. Instead, the question is *whether the law at that time clearly and unequivocally forbade the speech*. The courts cannot retroactively punish speech that, at the time it was uttered, the law seemed, in light of any relevant judicial interpretations, to permit. To do so is to punish a speaker for failing to steer clear of gray areas, which in this unique area of law, cannot be done. As the Supreme Court recently emphasized. *See FEC v. Wisconsin Right to Life*, 127 S. Ct. at 2669 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

In sum, the Court's decision in this case is in conflict with the holdings of both *WSRP* and *Bare*, which constituted the law of this State on campaign speech regulation in 2004 when VEC uttered the speech at issue in this case. The Court's new ruling upholding definitions in campaign speech regulations

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[4] We reemphasize that this case concerns the speech that lies at the core of the First Amendment. Where statutes operate nearer the periphery of the First Amendment's concern, so that "steering clear" gives up speech of limited First Amendment value, the analysis may shift.

that were declared unconstitutionally vague under the prior cases cannot now be applied retroactively to punish speech uttered by VEC in 2004, when this Court's prior cases were in effect, without violating both the First Amendment and the Due Process Clause of the Fourteenth Amendment. We therefore urge reconsideration of the decision so that it may be corrected, either by vacating it altogether or applying it only prospectively.

CONCLUSION

For the foregoing reasons, Petitioner VEC respectfully requests that the petition for reconsideration be granted.

Respectfully submitted this 3rd day of October 2007.

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APPENDIX K

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

[Filed Sept. 10, 2004]

NO. 04-2-01845-2

STATE OF WASHINGTON, *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,
Plaintiff,

v.

VOTERS EDUCATION COMMITTEE,
a political committee,
Defendant.

COMPLAINT FOR CIVIL PENALTIES AND FOR INJUNCTIVE RELIEF FOR VIOLATIONS OF CHAPTER 42.17 RCW

The plaintiff, for causes of action against the defendant, alleges as follows:

I. PARTIES

1.1 The Plaintiff, Washington State Public Disclosure Commission (hereafter "Commission") was established by RCW 42.17.350 and is charged by RCW 42.17.360-.370 with, *inter alia*, responsibility for enforcing various subsections of the state public disclosure laws contained in chapter 42.17 RCW. The Commission office is located in Olympia, Washington. Pursuant to RCW 42.17.080(1), each political committee as defined in RCW 42.17.040 must file with the commission periodic reports of contributions and expenditures.

1.2 The Defendant, Voters Education Committee ("Committee"), is a political committee registered with the Internal Revenue Service, pursuant to a Form 8871, Notice of Section 527 Status. The Committee's principal address, according to the IRS filing, is 12345 Lake City Way N.E., Seattle, WA 98125. The purpose of the Committee is identified as a "non-partician (sic), non-profit, non-discriminatory, political action committee which provides issue education." The Committee is also a political committee as defined in RCW 42.17.040.

II. JURISDICTION AND VENUE

2.1 This Court has subject matter jurisdiction over the Committee, pursuant to chapter 42.17 RCW and the Attorney General has authority to bring this action pursuant to RCW 42.17.395 and RCW 42.17.360.

2.2 The Committee has carried out the violations alleged below, in whole or in part, in Thurston County.

2.3 Venue is proper in this Court pursuant to chapter 4.12 RCW.

III. FACTUAL ALLEGATIONS

3.1 On or about September 2, 2004, the Committee sponsored political advertisements that were broadcast on television stations throughout the State of Washington. The ads have run on numerous occasions, on numerous stations, and in numerous cities and towns in Washington.

3.2 The ads in question concerned Deborah Senn, a candidate for Attorney General, who is on the September 14, 2004 primary election ballot. Ms. Senn

is currently not an elected official nor does she hold any public office.

3.3 The text of one of the ads is as follows:

> Who is Deborah Senn looking out for? As Insurance Commissioner, Senn suspended most of the $700,000 fine against an insurance company in exchange for the company's agreement to pay for four new staff members in Senn's own office. Senn even tied to cover up the deal from state legislators. The Seattle Post Intelligencer said Senn's actions easily could lead to conflict of interest abuses. Deborah Senn let us down. Log on to learn more.

3.4 The Commission staff determined as of September 9, 2004 that at least $365,000 had been spent at three television stations in the Puget Sound area. The ads had been running in media outlets throughout the state, including Seattle, Tacoma, Yakima, and Spokane.

3.5 The ad in question constitutes "express advocacy" on behalf of or against a candidate, not "issue advocacy," under *Washington State Republican Party v. Public Disclosure Commission*, 141 Wn.2d 245, 4 P.3d 808 (2000). Under that case, simple "issue advocacy" may not require the sponsor to register as a political committee. However, because the ad in question is express advocacy, the Committee is unquestionably required to register under RCW 42.17.080 and .090.

3.6 The *Washington State Republican Party* Court held that if an ad "presents a clear plea for action," and it is clear that it is "calling for . . . the election or defeat of a candidate," it constitutes

express advocacy. The ad in question is such express advocacy.

3.7 The *Washington State Republican Party* Court held that an ad cannot be characterized as "issue advocacy" if it attacks a person's character rather than his or her positions. Here, the ad in question attacks the character of a candidate for public office, namely, Deborah Senn, a candidate for Attorney General. Its first sentence questions, in the present tense, "Who is Deborah Senn looking out for?". When taken in context with the rest of the ad, it questions Senn's carrying out of her official duties while Insurance Commissioner. Its message is that she put her own interests above those of the public.

3.8 The ad also states "Senn even tried to cover up the deal from state legislators." The statement connotes dishonest activity and states that she acted in a manner intended to conceal something. The remainder of the ad imputes wrongdoing by Senn and that she cannot be trusted. As such, it is an attack on her character.

3.9 On September 7, 2004, the Commission staff advised the Committee that because of the ads it was running attacking Senn's character, that it was required to register as a political committee and file reports of expenditures and contributions. The Commission staff set a September 9, 2004 at noon deadline for filing.

3.10. The Committee has refused to file the required registration or expenditure/contribution forms.

3.11 On September 9, 2004, a special meeting of the Commission was convened on an enforcement matter. At that meeting, the Commission found that

the Committee had committed apparent multiple violations of the state public disclosure laws by running express advocacy ads and refusing to register and file as required by state law. Additionally, the Commission found apparent violations of the state public disclosure laws by the Committee's concealment of the identity of its contributors and the recipients of its expenditures.

3.12 By failing to identify its contributors and expenditures, the Committee's actions squarely violate the letter and spirit of the state public disclosure laws. RCW 42.17.010(1) provides that "political campaigns and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided."

IV. CLAIMS

Based on the foregoing allegations, Plaintiff makes the following claims:

4.1 First Claim—Plaintiff reasserts the allegations made above and further asserts that the Defendant, in violation of RCW 42.17.040, failed to properly or timely register as a political committee.

4.2 Second Claim—Plaintiff reasserts the allegations made above and further asserts that the Defendant, in violation of RCW 42.17.080 and .090, failed to properly and timely file reports of contributions received and expenditures made as a political committee.

4.3 Third Claim—Plaintiff reasserts the allegations made above and asserts that the Defendant, in violation of RCW 42.17.120, by concealing the identity of the source(s) of their contributions and their expenditures.

4.4 Fourth Claim—Plaintiff reasserts the allegations made above and further asserts that the actions of the Defendant stated in the above claims were negligent and/or intentional.

V. REQUEST FOR RELIEF

WHEREFORE, the Plaintiff requests the following relief as provided by statute:

1. For such remedies as the court may deem appropriate under RCW 42.17.390, including but not limited to imposition of a civil penalty, all to be determined at trial;

2. For an award of treble damages, if the violations are proven to be intentional;

3. For all costs of investigation and trial, including reasonable attorneys' fees;

4. For temporary and permanent injunctive relief; and

5. For such other relief that the Court deems appropriate.

DATED this 10th day of September, 2004.

CHRISTINE O. GREGOIRE
Attorney General

/s/ Linda A. Dalton
LINDA A. DALTON
Senior Assistant Attorney General
WSBA No. 15467
Attorneys for Plaintiff

APPENDIX L

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT
The Honorable Richard Jones

[Filed Nov. 3, 2004]

NO. 04-2-33247-8SEA

STATE OF WASHINGTON, *ex rel.* WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION,
Plaintiff,

v.

VOTERS EDUCATION COMMITTEE,
a political committee,
Defendant.

MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

* * * *

C. The VEC is a Political Committee Under RCW 42.17.040 and Therefore Must Report and Disclose to the PDC.

The distinction between "express" and "issue" advocacy contained in the *Washington State Republican Party* decision as it relies on *Buckley v. Valeo* is now irrelevant. The need to distinguish between "express" and "issue" advocacy for determining the VEC's reporting obligations has been eliminated. The PDC (and on review, this Court) no longer has an obligation to determine whether the ad in question constitutes "express" or "issue" advocacy prior to commencing an enforcement action. It only needs to apply the statutory provisions of

Washington Campaign Finance Laws. RCW 42.17.020, .040 - .090. Because the ad refers directly to a candidate for public office, Deborah Senn, the VEC had an obligation to register as a political committee and file disclosure reports. Its failures to do so constitute violations of chapter 42.17 RCW. Once liability under the Public Disclosure Act is established, the next step will be a hearing to determine the appropriate penalty under RCW 42.17.390.

D. Even if the Distinction between Express and Issue Advocacy is Preserved, the VEC Must File and Disclose Its Campaign Financing for the Political Advertisement It Sponsored in This Case.

Even if this Court were to determine that the *McConnell* case is distinguishable and not controlling here, this Court should still determine that the VEC violated the statute and that a penalty hearing is appropriate.

In Washington, the *Washington State Republican Party* case was the first case to analyze this state's campaign finance regulations for advocacy in light of the First Amendment to the United States Constitution and federal case law. In that case, the Washington Supreme Court relied upon the U.S. Supreme Court decision in *Buckley v. Valeo* for guidance. The case involved the contribution limits placed on parties by state law. There, the Republican Party argued that contribution limits and reporting obligations did not apply to its ads because the ads in question were "issue" advocacy. *Id.* at 263.

The Washington Supreme Court agreed and held that the reporting requirement did not apply to a "Tell Gary Locke" media campaign run in 1996 using so-called "soft money," when Governor Locke was

King County Executive and a candidate for Governor. In so concluding, the court determined that the "Tell Gary Locke" ad was "issue" advocacy. The Court did say, however, while state limitations on so-called "issue" advocacy would violate the First Amendment, the reporting requirements could be applied to "express" advocacy.

The Court, in defining "express" advocacy in Washington, held that when an ad "is unmistakable and unambiguous in its meaning, and presents a clear plea for the listener to take action to defeat [a] candidate," it is "express" advocacy. *Id.* at 273. If, in an ad, "a candidate's character and campaign tactics are attacked, the ad may be subject to only one reasonable interpretation: an exhortation to vote against the candidate." *Id.* at 270. In contrast, the Court described "issue" advocacy as advocacy that "intend[s] to inform the public about political issues germane to [an] election." *Id.* at 272.

In the event this Court determines that the distinction between "express" and "issue" advocacy articulated in *Washington State Republican Party* somehow survives *McConnell*, then a simple viewing of the taped political ad should convince this Court that this ad is "express" advocacy and therefore subject to the campaign finance laws. Unlike the ads in *Washington State Republican Party*, this ad is silent as to any particular issue.[6] It leads the viewer

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[6] *Washington State Republican Party*, 141 Wn.2d at 272 (The Republican Party admitted that it was trying to influence an election but it was doing so by educating voters on the candidate's position on the issues). In the Senn ad, no particular issue is ever identified in spoken form. The brief and vague reference to the word issue come at the end of the ad when on the screen the words www.senninsurancecrisis.com appear.

to conclude that Ms. Senn engaged in deceptive behavior, that she tried to "cover up" her actions and that she is actively looking out only for herself. It relates only to a former elected position she held as state Insurance Commissioner.

The ad first starts with this question: "Who is Deborah Senn looking out for?" It questions the listener in the present tense. It suggests a certain behavior. The ad goes on to describe behavior by Ms. Senn that undisputedly occurred when she was the state Insurance Commissioner, a position she has not held for almost four years. That rhetorical question does not relate to any alleged past practices of Ms. Senn; it relates to the present at a time when she was a candidate for state office. Under no reasonable interpretation could this ad be deemed anything other than "express" advocacy.

Then the ad states: "Senn even tried to cover up the deal from state legislators." This sentence serves as a direct attack on Ms. Senn's character. Synonyms for the term "cover up" include deceit, dishonesty or concealment on her part. Webster's Dictionary defines "cover up" as "an effort or strategy intended to conceal something, as a crime or scandal." *Webster's II, New Riverside University Dictionary* at 321 (1988). For the VEC to seriously suggest that this statement is not an attack on Ms. Senn's character would be disingenuous. Any language that imputes a crime or scandal can be nothing less than such an attack. For this reason alone, this ad should be classified as "express" advocacy. It provides an impetus for the listener to vote against Ms. Senn. It cannot be said with any type of honesty that a listener, knowing of Ms. Senn's candidacy for

Attorney General, could not see this as an "exhortation" to vote against her.

The ad then goes to say that Ms. Senn's actions could be viewed as a "conflict of interest." Even though the ad quotes from a newspaper article, it furthers taints the listener's view of Ms. Senn. A conflict of interest has been defined as "a conflict between the public obligations and the private interests of a public official." *Webster's II, New Riverside University Dictionary* at 297 (1988). To suggest such a conflict is to impute that Ms. Senn put her own private interests above that of the public in performing her public duties.

The final definition to be considered in this case is that of "character." It is used by the *Washington State Republican Party* case but not defined. Character has many definitions: public estimation or reputation; a combination of emotional, intellectual and moral qualities; or moral or ethical strength, i.e., integrity. *Webster's II, New Riverside University Dictionary* at 249. Any statement that assaults these definitions fits within the "express" advocacy definition set out in *Washington State Republican Party*.

Whether the individual statements identified above are evaluated singularly, or in their entirety, the political ad in question constitutes "express" advocacy. Given that it amounts to an attack on Ms. Senn's character, it has "only one reasonable interpretation: an exhortation to vote against the candidate", in this case, Deborah Senn. 141 Wn.2d at 270-71. The VEC had an obligation to register as a political committee because of this ad. Its failure to do so in a timely manner constitutes a violation of

state law subjecting it to penalties to be determined at a later date.

Once the VEC had the expectation of receiving contributions or making expenditures for "express" advocacy or action that exhorted the public to vote against a candidate, it was required to register as a political committee and filed detailed reports of its activities. RCW 42.17.020; RCW 42.17.040-.090. Such filings are not optional nor are they covered by any filings the VEC may make with the Internal Revenue Service.[7] Because the VEC failed to report or file as required by law, it violated state law for which an appropriate penalty should be assessed at a separate hearing.

* * * *

DATED this 3rd day of November, 2004.

CHRISTINE O. GREGOIRE
Attorney General

/s/ Linda A. Dalton
LINDA A. DALTON, WSBA #15467
Senior Assistant Attorney General
Attorney for Plaintiff

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[7] The VEC has contended in the past that because it is registered as a non-profit §527 corporation with the Internal Revenue Service, that the IRS required filings should be sufficient disclosure. A recent review of the IRS filings failed to locate any quarterly filing for the VEC. See Declaration of Susan Harris.

APPENDIX M

TITLE 40.—PUBLIC DOCUMENTS, RECORDS, AND PUBLICATIONS

CHAPTER 40.16.—PENAL PROVISIONS

§ 40.16.030. Offering false instrument for filing or record.

Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.

* * *

TITLE 42.—PUBLIC OFFICERS AND AGENCIES

CHAPTER 42.17.—DISCLOSURE—CAMPAIGN FINANCES—LOBBYING—RECORDS

§ 42.17.020. Definitions

* * * *

(17) "Election campaign" means any campaign in support of or in opposition to a candidate for election to public office and any campaign in support of, or in opposition to, a ballot proposition.

* * * *

(33) "Political committee" means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in

support of, or opposition to, any candidate or any ballot proposition.

* * *

§ 42.17.040. Statement of organization by political committees

(1) Every political committee, within two weeks after its organization or, within two weeks after the date when it first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier, shall file a statement of organization with the commission and with the county auditor or elections officer of the county in which the candidate resides, or in the case of any other political committee, the county in which the treasurer resides. A political committee organized within the last three weeks before an election and having the expectation of receiving contributions or making expenditures during and for that election campaign shall file a statement of organization within three business days after its organization or when it first has the expectation of receiving contributions or making expenditures in the election campaign.

(2) The statement of organization shall include but not be limited to:

(a) The name and address of the committee;

(b) The names and addresses of all related or affiliated committees or other persons, and the nature of the relationship or affiliation;

(c) The names, addresses, and titles of its officers; or if it has no officers, the names, addresses, and titles of its responsible leaders;

(d) The name and address of its treasurer and depository;

(e) A statement whether the committee is a continuing one;

(f) The name, office sought, and party affiliation of each candidate whom the committee is supporting or opposing, and, if the committee is supporting the entire ticket of any party, the name of the party;

(g) The ballot proposition concerned, if any, and whether the committee is in favor of or opposed to such proposition;

(h) What distribution of surplus funds will be made, in accordance with RCW 42.17.095, in the event of dissolution;

(i) The street address of the place and the hours during which the committee will make available for public inspection its books of account and all reports filed in accordance with RCW 42.17.080; and

(j) Such other information as the commission may by regulation prescribe, in keeping with the policies and purposes of this chapter.

(3) Any material change in information previously submitted in a statement of organization shall be reported to the commission and to the appropriate county elections officer within the ten days following the change.

* * *

§ 42.17.080. Reporting of contributions and expenditures—Inspection of accounts

(1) On the day the treasurer is designated, each candidate or political committee shall file with the commission and the county auditor or elections

officer of the county in which the candidate resides, or in the case of a political committee, the county in which the treasurer resides, in addition to any statement of organization required under RCW 42.17.040 or 42.17.050, a report of all contributions received and expenditures made prior to that date, if any.

(2) At the following intervals each treasurer shall file with the commission and the county auditor or elections officer of the county in which the candidate resides, or in the case of a political committee, the county in which the committee maintains its office or headquarters, and if there is no office or headquarters then in the county in which the treasurer resides, a report containing the information required by RCW 42.17.090:

(a) On the twenty-first day and the seventh day immediately preceding the date on which the election is held; and

(b) On the tenth day of the first month after the election: PROVIDED, That this report shall not be required following a primary election from:

(i) A candidate whose name will appear on the subsequent general election ballot; or

(ii) Any continuing political committee; and

(c) On the tenth day of each month in which no other reports are required to be filed under this section: PROVIDED, That such report shall only be filed if the committee has received a contribution or made an expenditure in the preceding calendar month and either the total contributions received or total expenditures made since the last such report exceed two hundred dollars.

When there is no outstanding debt or obligation, and the campaign fund is closed, and the campaign is concluded in all respects, and in the case of a political committee, the committee has ceased to function and has dissolved, the treasurer shall file a final report. Upon submitting a final report, the duties of the treasurer shall cease and there shall be no obligation to make any further reports.

The report filed twenty-one days before the election shall report all contributions received and expenditures made as of the end of the fifth business day before the date of the report. The report filed seven days before the election shall report all contributions received and expenditures made as of the end of the one business day before the date of the report. Reports filed on the tenth day of the month shall report all contributions received and expenditures made from the closing date of the last report filed through the last day of the month preceding the date of the current report.

(3) For the period beginning the first day of the fourth month preceding the date on which the special or general election is held and ending on the date of that election, each Monday the treasurer shall file with the commission and the appropriate county elections officer a report of each bank deposit made during the previous seven calendar days. The report shall contain the name of each person contributing the funds so deposited and the amount contributed by each person. However, contributions of no more than twenty-five dollars in the aggregate from any one person may be deposited without identifying the contributor. A copy of the report shall be retained by the treasurer for his or her records. In the event of deposits made by a deputy treasurer, the copy shall

be forwarded to the treasurer for his or her records. Each report shall be certified as correct by the treasurer or deputy treasurer making the deposit.

(4) If a city requires that candidates or committees for city offices file reports with a city agency, the candidate or treasurer so filing need not also file the report with the county auditor or elections officer.

(5) The treasurer or candidate shall maintain books of account accurately reflecting all contributions and expenditures on a current basis within five business days of receipt or expenditure. During the eight days immediately preceding the date of the election the books of account shall be kept current within one business day. As specified in the committee's statement of organization filed under RCW 42.17.040, the books of account must be open for public inspection as follows:

(a) For at least two consecutive hours between 8:00 a.m. and 8:00 p.m. on the eighth day immediately before the election, except when it is a legal holiday, in which case on the seventh day immediately before the election, at the principal headquarters or, if there is no headquarters, at the address of the treasurer or such other place as may be authorized by the commission; and

(b) By appointment for inspections to be conducted at the designated place for inspections between 8:00 a.m. and 8:00 p.m. on any other day from the seventh day through the day immediately before the election, other than Saturday, Sunday, or a legal holiday. It is a violation of this chapter for a candidate or political committee to refuse to allow and keep an appoint ment for an inspection to be conducted during these

authorized times and days in the week prior to the election. The appointment must be allowed at an authorized time and day for such inspections that is within twenty-four hours of the time and day that is requested for the inspection.

(6) The treasurer or candidate shall preserve books of account, bills, receipts, and all other financial records of the campaign or political committee for not less than five calendar years following the year during which the transaction occurred.

(7) All reports filed pursuant to subsection (1) or (2) of this section shall be certified as correct by the candidate and the treasurer.

(8) Copies of all reports filed pursuant to this section shall be readily available for public inspection for at least two consecutive hours Monday through Friday, excluding legal holidays, between 8:00 a.m. and 8:00 p.m., as specified in the committee's statement of organization filed pursuant to RCW 42.17.040, at the principal headquarters or, if there is no headquarters, at the address of the treasurer or such other place as may be authorized by the commission.

(9) After January 1, 2002, a report that is filed with the commission electronically need not also be filed with the county auditor or elections officer.

(10) The commission shall adopt administrative rules establishing requirements for filer participation in any system designed and implemented by the commission for the electronic filing of reports.

* * *

§ 42.17.090. Contents of report

(1) Each report required under RCW 42.17.080(1) and (2) shall disclose the following:

(a) The funds on hand at the beginning of the period;

(b) The name and address of each person who has made one or more contributions during the period, together with the money value and date of such contributions and the aggregate value of all contributions received from each such person during the campaign or in the case of a continuing political committee, the current calendar year: PROVIDED, That pledges in the aggregate of less than one hundred dollars from any one person need not be reported: PROVIDED FURTHER, That the income which results from a fund-raising activity conducted in accordance with RCW 42.17.067 may be reported as one lump sum, with the exception of that portion of such income which was received from persons whose names and addresses are required to be included in the report required by RCW 42.17.067: PROVIDED FURTHER, That contributions of no more than twenty-five dollars in the aggregate from any one person during the election campaign may be reported as one lump sum so long as the campaign treasurer maintains a separate and private list of the name, address, and amount of each such contributor: PROVIDED FURTHER, That the money value of contributions of postage shall be the face value of such postage;

(c) Each loan, promissory note, or security instrument to be used by or for the benefit of the candidate or political committee made by any person, together with the names and addresses of the lender and each person liable directly, indirectly or

contingently and the date and amount of each such loan, promissory note, or security instrument;

(d) All other contributions not otherwise listed or exempted;

(e) The name and address of each candidate or political committee to which any transfer of funds was made, together with the amounts and dates of such transfers;

(f) The name and address of each person to whom an expenditure was made in the aggregate amount of more than fifty dollars during the period covered by this report, and the amount, date, and purpose of each such expenditure. A candidate for state executive or state legislative office or the political committee of such a candidate shall report this information for an expenditure under one of the following categories, whichever is appropriate: (i) Expenditures for the election of the candidate; (ii) expenditures for nonreimbursed public office-related expenses; (iii) expenditures required to be reported under (e) of this subsection; or (iv) expenditures of surplus funds and other expenditures. The report of such a candidate or committee shall contain a separate total of expenditures for each category and a total sum of all expenditures. Other candidates and political committees need not report information regarding expendi tures under the categories listed in (i) through (iv) of this subsection or under similar such categories unless required to do so by the commission by rule. The report of such an other candidate or committee shall also contain the total sum of all expenditures;

(g) The name and address of each person to whom any expenditure was made directly or indirectly to compensate the person for soliciting or procuring signatures on an initiative or referendum

petition, the amount of such compensation to each such person, and the total of the expenditures made for this purpose. Such expenditures shall be reported under this subsection (1)(g) whether the expenditures are or are not also required to be reported under (f) of this subsection;

(h) The name and address of any person and the amount owed for any debt, obligation, note, unpaid loan, or other liability in the amount of more than two hundred fifty dollars or in the amount of more than fifty dollars that has been outstanding for over thirty days;

(i) The surplus or deficit of contributions over expenditures;

(j) The disposition made in accordance with RCW 42.17.095 of any surplus funds; and

(k) Such other information as shall be required by the commission by rule in conformance with the policies and purposes of this chapter.

(2) The treasurer and the candidate shall certify the correctness of each report.

* * *

§ 42.17.360. Commission—Duties

The commission shall:

(1) Develop and provide forms for the reports and statements required to be made under this chapter;

(2) Prepare and publish a manual setting forth recommended uniform methods of bookkeeping and reporting for use by persons required to make reports and statements under this chapter;

(3) Compile and maintain a current list of all filed reports and statements;

(4) Investigate whether properly completed statements and reports have been filed within the times required by this chapter;

(5) Upon complaint or upon its own motion, investigate and report apparent violations of this chapter to the appropriate law enforcement authorities;

(6) Prepare and publish an annual report to the governor as to the effectiveness of this chapter and its enforcement by appropriate law enforcement authorities; and

(7) Enforce this chapter according to the powers granted it by law.

* * *

§ 42.17.370. Commission—Additional powers

The commission is empowered to:

(1) Adopt, promulgate, amend, and rescind suitable administrative rules to carry out the policies and purposes of this chapter, which rules shall be adopted under chapter 34.05 RCW. Any rule relating to campaign finance, political advertising, or related forms that would otherwise take effect after June 30th of a general election year shall take effect no earlier than the day following the general election in that year;

(2) Appoint and set, within the limits established by the committee on agency officials' salaries under RCW 43.03.028, the compensation of an executive director who shall perform such duties and have such powers as the commission may prescribe and delegate to implement and enforce this chapter efficiently and effectively. The commission shall not delegate its authority to adopt, amend, or rescind rules nor shall

it delegate authority to determine whether an actual violation of this chapter has occurred or to assess penalties for such violations;

(3) Prepare and publish such reports and technical studies as in its judgment will tend to promote the purposes of this chapter, including reports and statistics concerning campaign financing, lobbying, financial interests of elected officials, and enforcement of this chapter;

(4) Make from time to time, on its own motion, audits and field investigations;

(5) Make public the time and date of any formal hearing set to determine whether a violation has occurred, the question or questions to be considered, and the results thereof;

(6) Administer oaths and affirmations, issue subpoenas, and compel attendance, take evidence and require the production of any books, papers, correspondence, memorandums, or other records relevant or material for the purpose of any investigation authorized under this chapter, or any other proceeding under this chapter;

(7) Adopt and promulgate a code of fair campaign practices;

(8) Relieve, by rule, candidates or political committees of obligations to comply with the provisions of this chapter relating to election campaigns, if they have not received contributions nor made expenditures in connection with any election campaign of more than one thousand dollars;

(9) Adopt rules prescribing reasonable requirements for keeping accounts of and reporting on a quarterly basis costs incurred by state agencies,

counties, cities, and other municipalities and political subdivisions in preparing, publishing, and distributing legislative information. The term "legislative information," for the purposes of this subsection, means books, pamphlets, reports, and other materials prepared, published, or distributed at substantial cost, a substantial purpose of which is to influence the passage or defeat of any legislation. The state auditor in his or her regular examination of each agency under chapter 43.09 RCW shall review the rules, accounts, and reports and make appropriate findings, comments, and recommendations in his or her examination reports concerning those agencies;

(10) After hearing, by order approved and ratified by a majority of the membership of the commission, suspend or modify any of the reporting requirements of this chapter in a particular case if it finds that literal application of this chapter works a manifestly unreasonable hardship and if it also finds that the suspension or modification will not frustrate the purposes of the chapter. The commission shall find that a manifestly unreasonable hardship exists if reporting the name of an entity required to be reported under RCW 42.17.241(1)(g)(ii) would be likely to adversely affect the competitive position of any entity in which the person filing the report or any member of his or her immediate family holds any office, directorship, general partnership interest, or an ownership interest of ten percent or more. Any suspension or modification shall be only to the extent necessary to substantially relieve the hardship. The commission shall act to suspend or modify any reporting requirements only if it determines that facts exist that are clear and convincing proof of the findings required under this section. Requests for

renewals of reporting modifications may be heard in a brief adjudicative proceeding as set forth in RCW 34.05.482 through 34.05.494 and in accordance with the standards established in this section. No initial request may be heard in a brief adjudicative proceeding and no request for renewal may be heard in a brief adjudicative proceeding if the initial request was granted more than three years previously or if the applicant is holding an office or position of employment different from the office or position held when the initial request was granted. The commission shall adopt administrative rules governing the proceedings. Any citizen has standing to bring an action in Thurston county superior court to contest the propriety of any order entered under this section within one year from the date of the entry of the order; and

(11) Revise, at least once every five years but no more often than every two years, the monetary reporting thresholds and reporting code values of this chapter. The revisions shall be only for the purpose of recognizing economic changes as reflected by an inflationary index recommended by the office of financial management. The revisions shall be guided by the change in the index for the period commencing with the month of December preceding the last revision and concluding with the month of December preceding the month the revision is adopted. As to each of the three general categories of this chapter (reports of campaign finance, reports of lobbyist activity, and reports of the financial affairs of elected and appointed officials), the revisions shall equally affect all thresholds within each category. Revisions shall be adopted as rules under chapter 34.05 RCW. The first revision authorized by this subsection shall reflect economic changes from the time of the last

legislative enactment affecting the respective code or threshold through December 1985;

(12) Develop and provide to filers a system for certification of reports required under this chapter which are transmitted by facsimile or electronically to the commission. Implementation of the program is contingent on the availability of funds.

* * *

§ 42.17.390. Civil remedies and sanctions

One or more of the following civil remedies and sanctions may be imposed by court order in addition to any other remedies provided by law:

(1) If the court finds that the violation of any provision of this chapter by any candidate or political committee probably affected the outcome of any election, the result of said election may be held void and a special election held within sixty days of such finding. Any action to void an election shall be commenced within one year of the date of the election in question. It is intended that this remedy be imposed freely in all appropriate cases to protect the right of the electorate to an informed and knowledgeable vote.

(2) If any lobbyist or sponsor of any grass roots lobbying campaign violates any of the provisions of this chapter, his registration may be revoked or suspended and he may be enjoined from receiving compensation or making expenditures for lobbying: PROVIDED, HOWEVER, That imposition of such sanction shall not excuse said lobbyist from filing statements and reports required by this chapter.

(3) Any person who violates any of the provisions of this chapter may be subject to a civil penalty of

not more than ten thousand dollars for each such violation. However, a person or entity who violates RCW 42.17.640 may be subject to a civil penalty of ten thousand dollars or three times the amount of the contribution illegally made or accepted, whichever is greater.

(4) Any person who fails to file a properly completed statement or report within the time required by this chapter may be subject to a civil penalty of ten dollars per day for each day each such delinquency continues.

(5) Any person who fails to report a contribution or expenditure may be subject to a civil penalty equivalent to the amount he failed to report.

(6) The court may enjoin any person to prevent the doing of any act herein prohibited, or to compel the performance of any act required herein.

* * *

§ 42.17.400. Enforcement

(1) The attorney general and the prosecuting authorities of political subdivisions of this state may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17.390.

(2) The attorney general and the prosecuting authorities of political subdivisions of this state may investigate or cause to be investigated the activities of any person who there is reason to believe is or has been acting in violation of this chapter, and may require any such person or any other person reasonably believed to have information concerning the activities of such person to appear at a time and place designated in the county in which such person

resides or is found, to give such information under oath and to produce all accounts, bills, receipts, books, paper and documents which may be relevant or material to any investigation authorized under this chapter.

(3) When the attorney general or the prosecuting authority of any political subdivision of this state requires the attendance of any person to obtain such information or the production of the accounts, bills, receipts, books, papers, and documents which may be relevant or material to any investigation authorized under this chapter, he shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered mail to the person at least fourteen days before the date fixed for attendance. Such order shall have the same force and effect as a subpoena, shall be effective statewide, and, upon application of the attorney general or said prosecuting authority, obedience to the order may be enforced by any superior court judge in the county where the person receiving it resides or is found, in the same manner as though the order were a subpoena. The court, after hearing, for good cause, and upon application of any person aggrieved by the order, shall have the right to alter, amend, revise, suspend, or postpone all or any part of its provisions. In any case where the order is not enforced by the court according to its terms, the reasons for the court's actions shall be clearly stated in writing, and such action shall be subject to review by the appellate courts by certiorari or other appropriate proceeding.

(4) Any person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is

reason to believe that some provision of this chapter is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter. This citizen action may be brought only if the attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after such notice and such person has thereafter further notified the attorney general and prosecuting attorney that said person will commence a citizen's action within ten days upon their failure so to do, and the attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice. If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he shall be entitled to be reimbursed by the state of Washington for costs and attorney's fees he has incurred: PROVIDED, That in the case of a citizen's action which is dismissed and which the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorney's fees incurred by the defendant.

(5) In any action brought under this section, the court may award to the state all costs of investigation and trial, including a reasonable attorney's fee to be fixed by the court. If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages. If damages or trebled damages are awarded in such an action brought against a lobbyist, the judgment may be awarded against the lobbyist, and the lobbyist's employer or employers joined as defendants, jointly, severally, or both. If the defendant prevails, he shall be awarded

all costs of trial, and may be awarded a reasonable attorney's fee to be fixed by the court to be paid by the state of Washington.

* * *

APPENDIX N

OTHER STATE STATUTORY PROVISIONS REFERENCED IN PETITION

- Arizona requires disclosures from "political committees," defined to include a group that "engages in political activity in behalf of or against a candidate." Ariz. Rev. Stat. Ann. § 16-901(19).
- Colorado regulates a "political committee," which is defined to include a group that has accepted "contributions," Colo. Const. art. XXVIII, § 2, cl. 12(a), which include transfers "for the purpose of promoting the candidate's . . . election." *Id.* § 2, cl. 5(a).
- Delaware defines a "political committee" based on whether it "accepts contributions or makes expenditures for or against any candidate." Del. Code Ann. tit. 15, § 8002(12).
- The District of Columbia defines a "political committee" to include a group "engaged in . . . promoting or opposing the . . . election of an individual to office." D.C. Code § 1-1101.01(5). Excluded from the definition of "contribution" are any "[c]ommunications . . . by any organization which . . . neither endorse nor oppose any candidate." *Id.* § 1-1101.01(6)(B)(iv).
- Hawaii defines a political "committee" to include an organization that "makes an expenditure for or against any" candidate. Haw. Rev. Stat. § 11-191.
- Idaho defines a "political committee" to include a group that makes expenditures "for the purpose of supporting or opposing one or more

candidates." Idaho Code Ann. § 67-6602(p)(2). An expenditure is a transfer "for the purpose of . . . assisting in furthering or opposing any election campaign." *Id.* § 67-6602(h).

- Illinois defines a "political committee" to include a group that makes "expenditures . . . in opposition to a candidate." 10 Ill. Comp. Stat. 5/9-1.9. An expenditure includes a transfer knowingly made "in connection with the . . . election of any person." *Id.* 5/9-1.5(1).
- Kentucky defines a "campaign committee" to include an organization that "makes expenditures to support or oppose one or more specific candidates." Ky. Rev. Stat. Ann. § 121.015(3).
- Louisiana requires reporting and disclosure of a person who makes a payment "for the purpose of supporting, opposing, or otherwise influencing" an election. La. Rev. Stat. §§ 18:1501.1(A), 18:1483(9)(a).
- Maine defines "political action committee" to include an organization with a specified purpose that spends "more than $1,500 . . . to initiate, advance, promote, defeat or influence in any way a . . . campaign." Me. Rev. Stat. Ann. tit. 21-A, § 1052(5)(A). Expenditures are defined to include transfers "for the initiation, support, or defeat of a campaign." *Id.* § 1052(4).
- Maryland defines "political committee" to include a group that "assists or attempts to assist in promoting the success or defeat of a candidate." Md. Code. Ann., Elec. Law § 1-101(ee).

- Massachusetts defines "political committee" to include a group that "makes expenditures for the purpose of opposing or promoting a charter change, referendum question . . . or other questions submitted to the voters." Mass. Gen. Laws Ann. ch. 55, § 1. "Expenditure" is defined to include a transfer "for the purpose of promoting or opposing a charter change." *Id.*
- Michigan defines a political "committee" to include a group that "receives contributions or makes expenditures . . . for or against the . . . election of a candidate." Mich. Comp. Laws Ann. § 169.203(4).
- Missouri defines "contributions" and "expenditures" as transfers "for the purpose of supporting or opposing the . . . election of any candidate." Mo. Rev. Stat. § 130.011(12), (16).
- Montana defines a "political committee" to include a group that "makes a contribution or expenditure to support or oppose a candidate." Mont. Code Ann. § 13-1-101(20)(a), (b).
- Nebraska defines "expenditure" to include a payment made "in assistance of, or in opposition to" the election of a candidate. Neb. Rev. Stat. § 49-1419.
- New Jersey defines "political committee" to include a group that "aid[s] or promote[s] the . . . election or defeat of any candidate . . . or . . . aid[s] or promote[s] the passage or defeat of a public question." N.J. Stat. Ann. § 19:44A-3(i).
- New York defines "political committee" to include a group organized "to aid or take part in

the election or defeat of a candidate." N.Y. Elec. Law § 14-100(1).

- North Carolina defines "[c]ontribution" and "expenditure" as transfers "to support or oppose [an] election." N.C. Gen. Stat. § 163-278.6(6), (9).
- North Dakota defines "political committee" to include a group that receives contributions or makes expenditures for "political purposes," which include "any activity undertaken in support of or in opposition to the election . . . of a candidate." N.D. Cent. Code § 16.1-08.1-01(8), (10).
- Oklahoma defines "political action committee" to include a group "with the primary or incidental purpose of supporting or opposing a candidate." Okla. Stat. Ann. tit. 51, § 304(22).
- Oregon defines "political committee" to include a group that receives contributions or makes expenditures "for the purpose of supporting or opposing a candidate." Or. Rev. Stat. § 260.005(16)(a).
- Rhode Island defines a "political action committee" to include a group that "accepts any contributions to be used for advocating the election or defeat of any candidate." R.I. Gen. Laws § 17-25-3(10).
- South Carolina defines a "committee" to include a group organized "to influence the outcome of an elective office," which includes making any communication that "promotes or supports a candidate or attacks or opposes a candidate, regardless of whether the communication

expressly advocates a vote for or against a candidate." S.C. Code. Ann. § 8-13-1300(6), (31)(c).

- Tennessee defines a "political campaign committee" to include an organization "making expenditures . . . to support or oppose any candidate." Tenn. Code Ann. § 2-10-102(12).
- Texas defines "specific-purpose committees" and "general-purpose committees" to include those having "among its principal purposes . . . supporting or opposing" candidates. Tex. Elec. Code Ann. § 251.001(13), (14). Texas also defines "political advertising" to include "a communication supporting or opposing a candidate." *Id.* § 251.001(16).
- Utah defines a "political action committee" to include a group that "makes expenditures for political purposes," which include acts that "tend to influence, directly or indirectly, any person to refrain from voting or to vote for or against any candidate." Utah Code Ann. § 20A-11-101(26)(a), (31).
- Vermont defines a "political committee" to include a group that accepts contributions or makes expenditures "for the purpose of supporting or opposing any campaign." Vt. Stat. Ann. tit. 17, § 2103(22). "Contribution" and "expenditure" are defined to include transfers "for the purpose of supporting or opposing" any campaign. *Id.* § 2103(9), (12).
- West Virginia defines a "political action committee" to include a committee organized "for the purpose of supporting or opposing . . . candidates." W. Va. Code Ann. § 3-8-1a(19).

- Wyoming defines a "political action committee" to include any group organized "for the purpose of raising, collecting, or spending money for use in the aid of, or otherwise influencing or attempting to influence, directly or indirectly, the election or defeat of candidates." Wyo. Stat. Ann. § 22-1-102(a)(xx).

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FILED
MAY 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 07-1153

IN THE SUPREME COURT OF THE UNITED STATES

VOTERS EDUCATION COMMITTEE, *ET AL.*,

Petitioners,

v.

THE WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Attorney General of Washington, on behalf of the Washington State Public Disclosure Commission and the other respondents, respectfully requests that the Court deny the petition for a writ of certiorari in this case.

STATEMENT

In 2004 there was an election for all statewide offices in Washington State. There were competitive primary election contests for both the Republican and Democratic nominations for attorney general. There were two candidates seeking the Democratic nomination—Deborah Senn and Mark Sidran. Ms. Senn had held the elected office of State Insurance Commissioner from 1993 to 2001, but she did not hold public office while she was running for attorney general. The primary election was held on September 14, 2004.

1. The Advertisement

On September 1, 2004, the Voters Education Committee (Committee) began running a 30-second television advertisement entitled "Better" regarding Ms. Senn. The advertisement ran for eight days and was carried on three television stations in the Puget Sound area. It was also run in Yakima and Spokane in Eastern Washington.[1]

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[1] During this period, the Committee ran a second advertisement regarding Ms. Senn entitled "New." Neither the Public Disclosure Commission nor the Attorney General's Office relied upon "New" in the enforcement proceeding against the Committee.

The Committee was incorporated in Washington as a nonprofit, nonstock corporation. The Committee was also exempt from federal income tax as a § 527 corporation because it engaged in "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office[.]" 26 U.S.C. § 527(e)(2). The Director of the Committee was Bruce Boram.

In the context of the campaign for attorney general, the Committee's advertisement did not discuss a legislative issue that was currently before the legislature or that was likely to be the subject of legislative scrutiny in the future. Rather, Mr. Boram described the advertisement as "criticizing Deborah Senn's tenure as the Washington State Insurance Commissioner . . . ." App. 2a ¶ 2. In the audio portion of the advertisement, the narrator asked: "Who is Deborah Senn looking out for?"[2] The narrator went on to explain that: "As Insurance Commissioner, Senn suspended most of a $700,000 fine against an Insurance company . . . in exchange for the company's agreement to pay for four new staff members in Senn's own office." The narrator stated that: "Senn even tried to cover up the deal from State Legislators" and that "The Seattle Post Intelligencer said Senn's actions '*easily could lead to conflict-of-interest abuses*'." The narrator concluded by telling viewers that: "Deborah Senn let us down." And, the narrator invited viewers to "log on to learn more."

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[2] The text of the advertisement is set out in the appendix at page 3a.

During the narration, the screen showed a photograph of Deborah Senn, with the background image of the Insurance Commissioner's Office. Superimposed on this image were the words: "Suspended $700,000 fine to get four new staff members in own office. *Seattle Times 2/20/97.*" The background image changed to the state legislature. The words over the new image stated: "Tried to Cover-Up Deal from State Legislature. *Seattle Time[sic] 2/20/97.*" The background image changed again to a *Seattle Post Intelligencer* Banner Head with the text "'easily could lead to conflict-of-interest abuses' *Seattle Post Intelligencer 2/27/97.*" At the end of the advertisement, there was a "White flash" and a web address: "www.senninsurancecrisis.com." The text concluded: "Paid for by Voters Education Committee."

Like the advertisement, and during the candidate campaign, the website did not discuss a current or future legislative issue. Rather, it discussed Ms. Senn's tenure as Insurance Commissioner.[3] The website had a photograph of Ms. Senn along with the headlines: "Deborah Senn: Insurance Commissioner 1993–2001" and "Deborah Senn's Policies Hurt the State." The text went on to explain that: "From 1993 until 2001, Deborah Senn was entrusted with protecting the insurance consumers of Washington State. On multiple occasions, her questionable judgment has cost the citizens of this state." The text accused Ms. Senn of adopting new rules that were so "poorly planned

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[3] The text of the website is set out in the appendix at page 4a-7a.

[that] thousands in our state lost the ability to purchase health insurance" and that it "took the legislature to clean up her mess, and bring health insurance choices back to the state." It stated that Ms. Senn's management of the agency "lead the National Association of Insurance Commissioners (NAIC) to consider revoking the state's accreditation." The website contained parts of articles from *National Underwriter Life & Health* and the *Insurance Journal* from December 1995 and January 2001, respectively, that were critical of Ms. Senn. The website also contained links to other articles.

2. Campaign Finance Disclosure Requirements In Washington

Congress prohibits corporations and labor unions from using funds in their treasuries to finance electioneering communications in elections for federal office. 2 U.S.C. § 441b. Washington law has no similar prohibition. However, Washington does impose campaign contribution limitations[4] and requires disclosure of contributions and expenditures. Wash. Rev. Code §§ 42.17.030–.135 implement the policy of the state that "political campaign . . . contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided." Wash. Rev. Code § 42.17.010(1) (2004); App. 8a.[5]

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[4] Wash. Rev. Code § 42.17.610, .640; App. 15a, 15a–20a.

[5] The campaign contribution limits set out in Washington's disclosure law were inspired, in part, "by the passage of the Federal Election Campaign Act of 1971" and the legislature deemed it "desirable to have implementing

The state's campaign finance law is administered by the Public Disclosure Commission (PDC). The PDC consists of five members "appointed by the governor, with the consent of the senate." Wash. Rev. Code § 42.17.350(1); App. 12a. The PDC has the authority to "(a) determine whether an actual violation of [the campaign finance law] has occurred; and (b) issue and enforce an appropriate order following such determination." Wash. Rev. Code § 42.17.395(1) (2004); App. 13a. In order to determine whether there has been an actual violation, the PDC is required to "hold a hearing pursuant to the Administrative Procedure Act[.]"[6] Wash. Rev. Code § 42.17.395(2) (2004); App. 14a. The PDC's orders finding a violation are subject to judicial review under the Administrative Procedure Act.[7] Wash. Rev. Code § 42.17.395(5) (2004); App. 14a–15a. If the PDC concludes that a person has violated the state's disclosure requirements, it may impose a civil penalty of up to $1,000 for a single violation and $2,500 if it finds multiple

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legislation at the state level." Wash. Rev. Code § 42.17.010(8) (2004); App. 8a. Disclosure of campaign contributions and expenditures also implement the policy that "the public's right to know of the financing of political campaigns . . . far outweighs any right that these matters remain secret and private." Wash. Rev. Code § 42.17.010(10) (2004); App. 8a.

[6] The Administrative Procedure Act provisions covering adjudicative proceedings are set forth in Wash. Rev. Code §§ 34.05.410–.494.

[7] The Administrative Procedure Act provisions covering judicial review of administrative adjudicative proceedings are set forth in Wash. Rev. Code §§ 34.05.510–.598.

violations. Wash. Rev. Code § 42.17.395(4) (2004); App. 14a. These penalties have increased since 2004

In lieu of holding a hearing to determine if there has been an actual violation, the PDC has the authority to "investigate and report apparent violations . . . to the appropriate law enforcement authorities[.]" Wash. Rev. Code § 42.17.360(5); Pet. 181a. This includes the authority to "refer the matter to the [state] attorney general[.]" Wash. Rev. Code § 42.17.395(3) (2004); App. 14a. If the attorney general brings an action to enforce the law, a court may impose "a civil penalty of not more than ten thousand dollars for each such violation." Wash. Rev. Code § 42.17.390(3) (2004); Pet. 185a–86a. The court may also "award to the state all costs of investigation and trial, including a reasonable attorney's fee[.]" Wash. Rev. Code § 42.17.400(5) (2004); Pet. 188a. If the court concludes that the violation is intentional, the "amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages." Wash. Rev. Code § 42.17.400(5) (2004); Pet. 188a.

Under the disclosure law, every "political committee, within two weeks after its organization or, within two weeks after the date when it first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier, shall file a statement of organization with the [PDC]." Wash. Rev. Code § 42.17.040(1) (2004); Pet. 172a. The law defines "political committee" to mean

> "any person (except a candidate or an individual dealing with his or her own funds

> or property) having the expectation of receiving contributions or making expenditures in *support of, or opposition to, any candidate* or any ballot proposition." Wash. Rev. Code § 42.17.020(33) (2004) (emphasis added); Pet. 171a.

The term "candidate" means "any individual who seeks nomination for election or election to public office." Wash. Rev. Code § 42.17.020(8) (2004); App. 8a.

The statement of organization includes the name and address of the committee, the name and address of the committee's officers or responsible leader, the name and address of its treasurer and financial institution in which it deposits its funds, and the candidate or ballot proposition it is supporting or opposing. Wash. Rev. Code § 42.17.040(2)(a)–(g) (2004); Pet. 172a. Such a political committee is required to report all contributions[8] received and expenditures[9] made prior to the time it filed its statement of organization and periodically thereafter.

3. Proceedings Before The Public Disclosure Commission

The staff of the PDC became aware of the Committee's television advertisements on September 1, 2004, when they began airing. The staff conducted an investigation and concluded that the Committee

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[8] The definition of the term "contribution" is set out in Wash. Rev. Code § 42.17.020(14) (2004), App. 9a–11a.

[9] The definition of the term "expenditure" is set out in Wash. Rev. Code § 42.17.020(19) (2004), App. 12a.

should register and file reports. On September 7, 2004, the PDC staff faxed a letter to Mr. Boram directing him to register the Committee and file reports. The staff gave Mr. Boram until September 9, 2004, at noon, to comply. On the 9th, the PDC received a letter from the Committee's lawyer stating that the "Better" ad was an issue advertisement, and that the Committee's speech was protected by the First Amendment.

Since the primary election was set for September 14, 2004, the PDC held a special meeting on September 9, 2004. The Committee's lawyer participated by telephone. The staff presentation to the PDC stated that the "Better" ad constituted express advocacy in opposition to Ms. Senn's candidacy for the office of attorney general. After discussing the matter, the PDC unanimously determined that there was an apparent violation of the disclosure law and voted to refer the matter to the Attorney General's Office.

On September 10, 2004, following the initiation of an enforcement proceeding against it, the Committee decided to register with the PDC and disclose the contributions it received and the expenditures it made. When asked why he had decided to register, Mr. Boram told the press: "We just decided it was becoming a distraction to what we are trying to accomplish[.]"[10] On September 12, 2004, the Committee disclosed that it received two contributions. One was in the amount of 1.5 million

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[10] *Seattle Post Intelligencer* article, September 11, 2004, can be found at page 721 of the Washington Supreme Court Clerk's Papers.

dollars from the United States Chamber of Commerce. The other was in the amount of $25 from an anonymous donor.[11] On September 13, 2004, the Committee disclosed that it had made expenditures of $1,402,608.64. In addition, it had liabilities in the amount of $4,081.62.

4. Proceedings In The Trial Court

On September 10, 2004, the Attorney General's Office filed an action in Thurston County Superior Court seeking civil penalties and injunctive relief against the Committee. On the same day, the Committee filed an action in King County Superior Court (docket number 04-2-23551-1SEA) seeking declaratory and injunctive relief against the PDC, its members and Executive Director, and the Attorney General. The PDC's enforcement action was transferred to King County (docket number 04-2-33247-8SEA). The cases were assigned to the same judge, but they were not consolidated. Subsequently, Ms. Senn was permitted to intervene in the Committee's action (docket number 04-2-23551-1SEA). Ms. Senn was never a party to the PDC's enforcement action.

The Attorney General's Office moved for partial summary judgment in the enforcement case (docket number 04-2-33247-8SEA) and the Committee moved for summary judgment in its action (docket number 04-2-23551-1SEA). These motions were heard on the same day. The trial court

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[11] The identity of a person making an aggregate contribution of less than $25 need not be reported. Wash. Rev. Code § 42.17.090(1)(b) (2004); Pet. 178a.

ruled in favor of the PDC. The trial court entered separate judgments in the two cases. One granted the PDC's motion for partial summary judgment (docket number 04-2-33247-8SEA). The other denied the Committee's motion for summary judgment and dismissed the Committee's action (docket number 04-2-23551-1SEA). Pet. 56a. The Committee appealed the dismissal of its action to the Washington Supreme Court. The Attorney General's Office and the Committee agreed to stay the enforcement action (docket number 04-2-33247-8SEA) pending the outcome of the Committee's appeal.

5. The Washington Supreme Court's Decision

The Washington Supreme Court affirmed the trial court in a seven to two decision. There were four main points in the court's analysis. First, since the disclosure statute imposed a restriction on political speech, the court began by considering the appropriate level of scrutiny. Since the Committee was challenging a disclosure statute, the court did not apply strict scrutiny. Relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), the court stated that "disclosure regulations must survive 'exacting scrutiny' and that there must be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." Pet. 11a–12a. According to the court, the "governmental interests sought to be vindicated by disclosure requirements, such as providing the electorate with information and deterring corruption and the appearance of corruption, are sufficiently important to outweigh the possibility of infringement." Pet. 12a (internal

quotation marks omitted). The court concluded that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." Pet. 12a.

Second, the court rejected the Committee's primary claim that the phrase "in support of, or opposition to, any candidate" in the definition of "political committee" was unconstitutionally vague. Pet. 19a. The court stated that a statute is "void for vagueness 'if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" Pet. 15a. The court held that the statute was not vague. The majority stated that "the phrase 'in support of, or opposition to, any candidate' . . . is significantly more precise than the phrase 'relative to a clearly identified candidate,' which the Court determined was vague in *Buckley*." Pet. 19a. The court also relied on *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). In *McConnell*, this Court held that the words "promote," "oppose," "attack," and "support" in the definition of "public communications" "provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." Pet. 20a (quoting *McConnell*, 540 U.S. at 170 n.64).

Third, the court rejected the Committee's claim that the definition of "political committee" must be limited to a committee engaged in express advocacy containing so called "magic words." The court explained that *Buckley* held "that the phrase 'relative to' was vague in that it failed to clearly

mark the boundary between permissible and impermissible speech." Pet. 16a (internal quotation marks omitted). The majority explained that *Buckley* applied a narrowing construction to the statute so it applied "only to expenditures for communications that expressly advocated the election or defeat of a clearly identified candidate [and that *Buckley* provided examples] such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" Pet. 16a. The Committee argued that express advocacy was limited exclusively to the words listed in *Buckley*. However, the majority explained that *McConnell* "rejected the argument that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy[.]" Pet. 17a. Thus, the narrow reading of the statute in *Buckley* did not "suggest[] that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." Pet. 18a.

Finally, the court held that the "'Better' advertisement was clearly in opposition to Senn's candidacy." Pet. 24a. In reaching this conclusion, the court contrasted "Better" with the advertisement at issue in *Washington State Republican Party v. Washington State Public Disclosure Commission*, 141 Wash. 2d 245, 4 P.3d 808 (2000) (*WSRP*). The court explained that *WSRP* dealt with an "advertisement list[ing] facts that indicated [Gary] Locke's position on fighting crime, such as voting 'no' on the 'Three Strikes, You're Out law.'" Pet. 16a. *WSRP* held that it would be unconstitutional to apply contribution limits to the ad. According to the majority: "We

determined that the Locke advertisement was issue advocacy because it attacked his stance on an issue rather than his character." Pet. 16a. In contrast, the court held that "Better" was not the type of advertisement that simply makes a neutral, factual assertion which could be viewed as supporting by some, but viewed as opposing by others, depending on the viewer's opinion of the neutral assertion. Pet. 24a. Unlike the example, "'Jones will cut hospital funding,' 'Better' expressly supplied viewers with a conclusion to be drawn from the advertisement—'Deborah Senn Let Us Down.'" Pet. 24a (citation omitted). The majority concluded that "[g]iven Senn's status—no longer incumbent insurance commissioner and currently a candidate for attorney general—the 'Better' advertisement was *clearly in opposition to Senn's candidacy*." Pet. 24a (emphasis added).[12]

Two Justices dissented from the court's decision. In the view of the dissent, "[c]ontent-based restrictions on speech are presumptively

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[12] In light of its conclusion that the definition of political committee was not vague, the court stated that it was not required to decide whether "Better" constituted express or issue advocacy and declined to reach the issue. Pet. 25a. However, the majority's holding that the advertisement was "clearly in opposition to Senn's candidacy" (Pet. 24a), is an unmistakable and implicit conclusion that the advertisement was the functional equivalent of express advocacy. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 206 (2003); *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, __ U.S. __, 127 S. Ct. 2652, 2667 (2007) (*WRTL II*).

unconstitutional and are thus subject to strict scrutiny." Pet. 37a. And, the dissent concluded that the "statute's 'support or oppose' language is not 'sharply drawn.'" Pet. 39a. The dissent criticized the court's reliance on *McConnell's* conclusion that the terms support and oppose were not vague. According to the dissent, "*McConnell* [*v. Fed. Election Comm'n*, 540 U.S. 93 (2003)] was referring only to *party speakers* (such as political party operatives), and not referring to the private, independent speech at issue here." Pet. 40a. Finally, the dissent relies on *Federal Election Commission v. Wisconsin Right to Life, Inc.*, __ U.S. __, 127 S. Ct. 2652 (2007) (*WRTL II*). According to the dissent, the "majority cannot point to a particular phrase in the disputed advertisements that is 'susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate' [under] *WRTL* II." Pet. 41a.

REASONS FOR DENYING THE WRIT

The Court should deny the writ. The phrase "support of, or opposition to, any candidate" in Washington's definition of political committee is clear and straightforward. By its terms, it applies to the full spectrum of express advocacy from so called "magic words" to issue ads that are the functional equivalent of express advocacy. It does not regulate or threaten to regulate genuine issue advocacy as the Committee asserts. Nor does the decision conflict with *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 663 (5th Cir. 2006), or *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712–13 (4th Cir. 1999). These decisions involve statutes different from Washington's that included language,

in addition to support or oppose, that rendered them vague. For the same reason, and contrary to the Committee's claim, the decision below is not inconsistent with *Buckley*. The Committee's concern with the Washington Supreme Court's discussion of footnote 64 in *McConnell* is misplaced. *McConnell* and *Buckley* considered different statutory language. And, as the decision below recognizes, in no sense did *McConnell* overrule *Buckley*. Finally, the decision below presents no threat to freedom of speech, let alone one that is national in scope. At best, the decision below would be nonbinding precedent interpreting a statute that only used the words "support or oppose." It would have little value or no value in interpreting the numerous statutes cited by the Committee that involve other language.

1. The Committee's Claim That The Decision Below Would Require Disclosure With Respect to Issue Advertisement Is Unjustified

The theme underlying the Committee's petition and the submissions of the amici curiae is that an organization will be subject to Washington's disclosure requirements if it runs genuine issue advertisements. There is no basis for this claim. An issue advertisement might "influence" or "relate to" a candidate. However, Washington's definition of political committee does not use these vague terms. Consistent with the decision below, under Washington law, an advertisement that "supports or opposes" a candidate is one where it is clear that the advertisement is calling for a vote for or against the candidate. *WSRP*, 141 Wash. 2d at 267, 4 P.3d at

820. The support or oppose standard does not reach issue advertisements.

Consistent with the decision below, in *WSRP*, the court defined express advocacy and held that it would be unconstitutional to apply contribution limits to issue advertisement. *WSRP* dealt with two separate television advertisements run by the State Republican Party with regard to Gary Locke, a county elected official as well as a candidate for governor. The first advertisement discussed several of Locke's positions on criminal justice issues and concluded "Tell Gary Locke that's not what *we* call getting tough on crime. Tell Gary Locke that we deserve *better*." *WSRP*, 141 Wash. 2d at 252, 4 P.3d at 813.

In considering what constitutes express advocacy that may be regulated by the PDC, the *WSRP* explained that an advertisement was "express advocacy when it is susceptible of no other reasonable interpretation than as an exhortation to vote for or against a candidate." *WSRP*, 141 Wash. 2d at 267, 4 P.3d at 820. It must be "clear that the action [the speech] is calling for is the election or defeat of a candidate. If reasonable minds could differ as to whether the speech calls for a vote for or against a candidate, or calls for some other kind of action, the speech is not express advocacy." *Id.* Thus, the question with the first Locke advertisement was "whether it [was] susceptible only to an interpretation that it called for such a vote." *Id.* at 271, 4 P.3d at 823. The court held that the first Locke ad was an issue advertisement.

The Court held that the second Locke advertisement constituted express advocacy. The text of the second ad was the same as the first, except that it ended with: "And now he wants to be our governor? Gary Locke: another extreme liberal we just can't afford." *WSRP*, 141 Wash. 2d at 273, 4 P.3d at 823. The court did not look for so-called magic words. Rather, the court concluded that the second ad was express advocacy because the "language in the second ad is unmistakable and unambiguous in its meaning, and presents a clear plea for the listener to take action to defeat candidate Gary Locke. Reasonable minds could not differ as to whether the second ad calls for a vote against Locke." *Id.* at 273, 4 P.3d at 824 (citation omitted).

The Washington standard to distinguish express advocacy from issue advocacy is fully consistent with *McConnell* and *WRTL II*. In *McConnell*, the Court rejected the notion advocated by the Committee in this case that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared *with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad.*" *McConnell*, 540 U.S. at 193 (emphasis added). To distinguish between express and issue advocacy, *McConnell* introduced a new term—the functional equivalent of express advocacy.

McConnell considered section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which extended the ban on corporate and union expenditures for express advocacy, to all

electioneering communications. In considering the facial argument that this expansion violated the First Amendment, because it would ban corporations and unions from paying for issue advertisements, the Court explained that this "argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy.*" *McConnell*, 540 U.S. at 206 (emphasis added). According to the Court, the "justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *Id.* *McConnell* did not precisely define what constituted the functional equivalent of express advocacy.

The *WRTL II* plurality opinion explained what constitutes the functional equivalent of express advocacy. "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S. Ct. at 2667 (plurality opinion). This is an "objective [test], focusing on the substance of the communication rather than amorphous considerations of intent and effect." *Id.* at 2666. However, "[c]ourts need not ignore basic background information that may be necessary to put an ad in context—such as whether an ad describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future." *Id.* at 2669 (internal quotation marks omitted).

The test for distinguishing between express and issue advocacy adopted by the Washington Supreme Court in *WSRP* does not conflict with the test articulated by the plurality opinion in *WRTL II*, and the decision below is consistent with that test. The Committee's "Better" advertisement is susceptible of no reasonable interpretation other than as an appeal to vote against Ms. Senn. As the decision below stated, "the 'Better' advertisement was clearly in opposition to Senn's candidacy." Pet. 24a.

2. There Is No Conflict Between The Decision Below And The Cases Cited By The Committee

The Committee claims that the decision below conflicts with two decisions of the federal court of appeals. There is no conflict because both decisions involve statutes that contain language in addition to the words "support" and "oppose" in Washington's law.[13] It was this additional language that the courts held to be vague.

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[13] The same is true of the loyalty oath cases cited by the Committee. It was language other than "support" or "oppose" that the Court held to be vague. *Cramp v. Bd. of Pub. Instruction of Orange County, Fla.*, 368 U.S. 278, 286 (1961) ("The provision is completely lacking in these or any other terms susceptible of objective measurement. Those who take this oath must swear, rather, that they have not in the unending past ever knowingly lent their 'aid,' or 'support,' or 'advice,' or 'counsel' or 'influence' to the Communist Party. What do these phrases mean?"); *Baggett v. Bullitt*, 377 U.S. 360, 367, 371 (1964) (There were two oaths considered in *Baggett*. The 1955 oath was vague because a "teacher must swear that he is not a subversive person: that he is not one who commits an act or who advises, teaches, abets or advocates by any means another person to commit or aid in the commission

In *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 663 (5th Cir. 2006), the definition of "expenditure" was "a purchase, payment, advance, deposit, or gift, of money or anything of value made for the purpose of supporting, opposing, *or otherwise influencing* the nomination or election of a person to public office." (Emphasis added.) The court's analysis focused solely on the word "influencing." The court explained that the "source of vagueness [in *Buckley*] was the 'for the purpose of influencing' language within the definition of expenditure[.]" *Id.* at 664. And the court concluded that since the statute linked "the disclosure requirements for expenditures made by independent individuals and groups to the same *'for the purpose of influencing'* language that the Court confronted and upheld in *Buckley*, we can likewise construe the CFDA in a way that saves it from constitutional infirmity." *Id.* (emphasis added).

Similarly, in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712–13 (4th Cir. 1999), the definition of "political committee" was "a combination of two or more individuals, or any person, committee, association, or organization, the primary or incidental purpose of which is to support or oppose any candidate or political party or *to influence or*

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of any act intended to overthrow or alter, or to assist the overthrow or alteration, of the constitutional form of government by revolution, force or violence." The 1931 oath was vague because it "exacts a promise that the affiant will, by precept and example, promote respect for the flag and the institutions of the United States and State of Washington. The range of activities which are or might be deemed inconsistent with the required promise is very wide indeed.").

attempt to influence the result of an election." (Emphasis added.) The crux of the plaintiff's concern in *Bartlett* was the "influence or attempt to influence" language. The plaintiff intended to run issue advertisements and was concerned that it would meet the definition of a "political committee" because "*issue advocacy may influence an election* even though it does not expressly advocate the election or defeat of a particular candidate or party." *Bartlett*, 168 F.3d at 708 (emphasis added). The court did not discuss or even hint that the support or oppose language was vague.[14]

3. The Decision Below Is Not Inconsistent With *Buckley*

The Committee also argues that the decision below is inconsistent with *Buckley*. According to the Committee, "'*[A]dvocating the election or defeat' of a candidate* is, if anything, a more precise test than the more subjective 'support or oppose' standard. Yet *Buckley* held the advocacy formulation to be vague . . . ." Pet. 14 (emphasis added) (alteration in

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[14] The same is true in *Anderson v. Spear*, 356 F.3d 651, 663–65 (6th Cir. 2004), a case the Committee cites but does not discuss. *Anderson* concerned a statute that established a 500-foot barrier around polling places in which electioneering was prohibited. The definition of electioneering included "the *displaying of signs, the distribution of campaign literature, cards, or handbills*, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but shall not include exit polling." *Anderson*, 356 F.3d at 663. Again, the court did not discuss or question the support or oppose language. Rather, the court said that the statute was "vague, sweeping in, *inter alia*, 'the displaying of signs, the distribution of campaign literature, cards, or handbills. . . .'" *Id.* at 665.

original). This argument fails because *Buckley* did not find the language "advocating the election or defeat" of a candidate to be vague. Instead, *Buckley* focused on two other phrases that rendered the statute vague.

The first vague phrase was "relative to." According to the Court, the "key operative language of the provision limits 'any expenditure . . . *relative to*' a clearly identified candidate." *Buckley*, 424 U.S. at 41 (emphasis added). The Court explained that the "*use of so indefinite a phrase as 'relative to'* a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of § 608(e)(1) make sufficiently explicit the range of expenditures covered by the limitation." *Id.* at 41–42 (emphasis added).

The second vague phrase was "for the purpose of . . . influencing." The Court explained that "'[c]ontributions' and 'expenditures' are defined in parallel provisions in terms of the use of money or other valuable assets *'for the purpose of . . . influencing'* the nomination or election of candidates for federal office. It is the ambiguity of this phrase that poses constitutional problems." *Buckley*, 424 U.S. at 77 (emphasis added) (footnote omitted). The Court concluded that "[a]lthough the phrase, 'for the purpose of . . . influencing' an election or nomination, differs from the [phrase 'relative to'] it shares the same potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79.

Thus, the decision below is not inconsistent with *Buckley*. The Washington definition of political committee is limited to "support of, or opposition to,

any candidate[.]" Wash. Rev. Code § 42.17.020(33) (2004), Pet. 171a. The definition does not use the vague phrases "relative to" and "for the purpose of influencing" that troubled the Court in *Buckley*.

4. The Discussion Of Footnote 64 In The Decision Below Does Not Merit The Court's Review

The Committee argues that the Court should grant the review because the Washington Supreme Court relied on footnote 64 in *McConnell* to support its conclusion that the terms support and oppose are not vague. According to the Committee this "would mean *McConnell* had, via footnote, overruled a holding of *Buckley*[.]" Pet. 16. There is no basis for this argument. *Buckley* dealt with the vague phrases "relative to" and "for the purpose of influencing." A holding in *McConnell* that the words "support" and "oppose" are not vague casts no shadow on *Buckley* at all. And the decision below does not hold otherwise. According to the Washington Supreme Court, the "trial court's implication that *McConnell* overturned *Buckley* and erased the distinction between express advocacy and issue advocacy does not accurately reflect the holding of *McConnell*." Pet. 25a. Rather, the majority explained that "*McConnell* did clarify that the distinction between express advocacy and issue advocacy articulated in *Buckley* was not constitutionally mandated but was instead a tool of statutory construction." Pet. 25a.

The Committee also argues that the words "support" and "oppose" are not vague in *McConnell* because the context is limited to political party speakers. Pet. 16–17. *McConnell* stated:

> "We likewise reject the argument that § 301(20)(A)(iii) is unconstitutionally vague. *The words* promote, *oppose,* attack, and *support clearly set forth the confines within which potential party speakers must act* in order to avoid triggering the provision. These words provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *McConnell,* 540 U.S. at 170 n.64 (emphasis added) (internal quotation marks omitted).

It is certainly true that the statute in *McConnell* was directed at party speakers. However, there is no indication that the words were clear only because party speakers are involved. Indeed, the next sentence indicates that this is not the case. *McConnell* went on to state: "*This is particularly the case here,* since actions taken by political parties are presumed to be in connection with election campaigns." *Id.* (emphasis added). The Court did not say that words were clear only because political parties are involved. Rather, the presence of party speakers was an additional reason why the language was not ambiguous.

In any event, this question is not ripe for review. The Committee points to no conflict concerning the meaning of footnote 64. Nor is the question of such significance that the Court should depart from its usual practice of letting questions percolate in the lower courts until a genuine conflict develops.

5. The Decision Below Poses No Threat To Free Speech, Let Alone A Nationwide Threat

The Committee concludes its petition by arguing that "the Washington court's ruling creates a nationwide threat to free speech." Pet. 19. This claim is surely overblown. The decision below holds that because the Committee broadcast an advertisement "clearly in opposition to Senn's candidacy" (Pet. 24a), it was required to register as a political committee under Washington's statute. Such a decision poses no threat to free speech. Moreover, unlike a decision of the federal court of appeals, the decision below is only binding precedent in Washington. It will have little relevance to statutes that, unlike the Washington statute, include other terms such as "relative to" and "for the purpose of influencing." As Appendix N to the petition makes clear, many states have language beyond the words support or oppose.[15] The decision below has little

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[15] *See, e.g.*, La. Rev. Stat. §§ 18:1501.1(A), 18:1483(9)(a) (requiring disclosure of persons "who make payments 'for the purpose of supporting, opposing, or otherwise influencing' an election") (Pet. 191a); Utah Code Ann. § 20A-11-101(26)(a), (31) ("political action committee" includes a group that makes expenditures that "tend to influence, directly or indirectly, any person to . . . vote for or against any candidate") (Pet. 194a); Wyo. Stat. Ann. § 22-1-102(a)(xx) ("political action committee" includes any group organized "for the purpose of raising, collecting, or spending money for use in the aid of, or otherwise influencing or attempting to influence, directly or indirectly, the election or defeat of candidates") (Pet. 195a).

relevance for those laws. Even where another jurisdiction's statute is limited to supporting or opposing a candidate, the decision below is merely nonbinding authority upon which another state court may or may not rely.

The exaggerated nature of the threat claimed by the Committee is also confirmed by the tepid amicus support for the petition. The presence of the Chamber as an amicus curiae does not demonstrate that this is a nationally important case. Given the Chamber's funding of the Committee's advertisement, its role in the underlying case and its funding of this litigation, it is more akin to a second brief filed by a party. *See* Chamber Br. 1 n.1. And while we do not dispute that the Center For Competitive Politics is interested in a more free and competitive electoral process (Center Br. 1), if the decision below were truly a nationwide threat to free speech, one would expect to see a host of amicus curiae briefs filed by organizations whose purpose is to defend the First Amendment.

There is nothing in this case that justifies the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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May 2, 2008

APPENDIX

Honorable Richard A. Jones
Hearing Date: December 3, 2004
Hearing Time: 8:30 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

VOTERS EDUCATION COMMITTEE, a Washington nonprofit corporation; BRUCE BORAM, an individual; VALERIE HUNTSBERRY, an individual, Plaintiffs, vs. WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION; MICHAEL CONNELLY, JEANETTE WOOD, FRANCIS MARTIN, EARL TILLY, and JANE NOLAND, Commissioners of the Washington State Public Disclosure Commission in their individual capacities, VICKI RIPPIE, Executive Director of the Washington State Public Disclosure Commission, in her individual capacity, and CHRISTINE GREGOIRE, Attorney General, of the State of Washington in her individual capacity, Defendants, and DEBORAH SENN, Intervenor.	NO. 04-2-23551-1 SEA DECLARATION OF BRUCE BORAM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

BRUCE BORAM declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am one of the plaintiffs in this case and am the Director of Voters Education Committee. I am competent to testify and make this declaration of my personal knowledge.

2. Attached hereto as *Exhibit A* are true and accurate copies of the text of the two television advertisements criticizing Deborah Senn's tenure as the Washington State Insurance Commissioner that Voters Education Committee aired between approximately September 1, 2004, and September 8, 2004.

3. Attached hereto as *Exhibit B* is a true and accurate copy of the www.senninsurance crisis.com web site home page. All of the links listed on the home page were to complete newspaper articles regarding Ms. Senn's tenure as Insurance Commissioner or the insurance crisis in Washington State.

SIGNED this *3* day of November, 2004 in Kirkland, Washington.

Bruce Boram

BRUCE BORAM

[page]

Exhibit A

[page]

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[page]

"Better – B" – 30 second TV

Video	Audio
Words on screen in special effect.	**Who is Deborah Senn looking out for?**
Photo of DS, background image of Insurance Commissioner Office. Words on screen: **Suspended $700,000 fine to get four new staff members in own office.** ***Seattle Times 2/20/97***	**As Insurance Commissioner, Senn suspended most of a $700,000 fine against an Insurance company . . . in exchange for the company's agreement to pay for four new staff members in Senn's own office.**
Background change to State Leg. Words on screen: **Tried to Cover-Up Deal from State Legislature.** ***Seattle Time[sic] 2/20/97***	**Senn even tried to cover up the deal from State Legislators.**
Newspaper background. SPI Banner Head. Pull quotes from article: **"easily could lead to conflict-of-interest abuses"** *Seattle Post Intelligencer 2/27/97*	**The Seattle Post Intelligencer said Senn's actions "*easily could lead to conflict-of-interest abuses*"**
White flash. Words on Screen: **www.senninsurance crisis.com**	**Deborah Senn let us down . . . log on to learn more.** ***B Boram***
Paid for by Voters Education Committee	

[page]

Exhibit B

[page]

2004 Status Update
Insurance
Crisis

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Home	Citizens Lose Options	Small Business Crisis

Deborah Senn: Insurance Commissioner 1993–2001

Deborah Senn's Policies Hurt the State

[photo of Deborah Senn]

From 1993 until 2001, Deborah Senn was Washington State. On multiple occasions, this state.

On entering the office she unilaterally the citizens. So poorly planned were these purchase health insurance. It took the insurance choices back to the state.

By 1999, Senn's management of the Commissioners (NAIC) to consider to withdraw from the organization. Democrat Senn's eight year reign. One of his top with the NAIC and repairing the political

entrusted with protecting the insurance consumers of her questionable judgment has cost the citizens of

enacted new insurance rules she claimed were to help rules that thousands in our state lost the ability to legislature to clean up her mess, and bring health

department lead the National Association of Insurance revoking the state's accreditation. Senn's response was Mike Kreidler was elected to the office following priorities was returning the state to good standing damage Senn had left behind.

Rate Increases:
Average Consumers Pay the Price For Senn's Rules

National Underwriter Life & Health-December 25, 1995

Several insurers said a three-month 'open enrollment' period in 1994, mandated by the now-defunct 1993 Health Services Act, burdened them with an influx of high-risk individuals with costly, pre-existing conditions. But Ms. Senn pointed to the repeal of community-based rating during the state's May 1995 legislative session for fueling rate increase requests from insurers for their individual policies.

'We are seeing the effects of the repeal of cost-containment

[page]

measurers. Some argued that the free market would take care of it, but it didn't,' Ms. Taylor-McGhee said.

More Articles . . .

1995: Health Services Act of 1993 Repealed

Washington Needs an Appointed Insurance Commissioner

Mandates Increase Costs and Reduce Access to Affordable Health Insurance

Washington State Insurance Commissioner Seeks to Resolve Past Political Bickering

Insurance Journal - January 16, 2001:

Newly elected Washington Insurance Commissioner Mike Kreidler wants to regain some powers stripped away by lawmakers peeved at predecessor Deborah Senn, Knight Ridder/Tribune Business News service has reported. Kreidler reportedly plans to also seek the re-accreditation of the office and expand availability of lower-cost drugs.

His predecessor, the controversial Senn, who lost a bid for the U.S. Senate in November, had alienated many legislators

[page]

during her eight years in office. The news service reported Kreidler expects to mend those relations over the next few months. Last year, lawmakers took away the insurance commissioner's power to regulate health insurance premiums, a direct slap at then-Commissioner Senn, according to a quote in the news service report that was attributed to Kreidler. And the commissioner's office can no longer conduct hearings using its own administrative law judges, he was reported as saying.

Read Full Article . . .

Wash. Rev. Code 42.17.010 Declaration of policy. It is hereby declared by the sovereign people to be the public policy of the state of Washington:

(1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

. . . .

(8) That the concepts of disclosure and limitation of election campaign financing are established by the passage of the Federal Election Campaign Act of 1971 by the Congress of the United States, and in consequence thereof it is desirable to have implementing legislation at the state level.

. . . .

(10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

. . . .

Wash. Rev. Code 42.17.020 Definitions.

. . . .

(8) "Candidate" means any individual who seeks nomination for election or election to public office. An individual seeks nomination or election when he or she first:

(a) Receives contributions or makes expenditures or reserves space or facilities with intent to promote his or her candidacy for office;

(b) Announces publicly or files for office;

(c) Purchases commercial advertising space or broadcast time to promote his or her candidacy; or

(d) Gives his or her consent to another person to take on behalf of the individual any of the actions in (a) or (c) of this subsection.

. . . .

(14)(a) "Contribution" includes:

(i) A loan, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, transfer of funds between political committees, or anything of value, including personal and professional services for less than full consideration;

(ii) An expenditure made by a person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a political committee, or their agents;

(iii) The financing by a person of the dissemination, distribution, or republication, in whole or in part, of broadcast, written, graphic, or other form of political advertising prepared by a candidate, a political committee, or its authorized agent;

(iv) Sums paid for tickets to fund-raising events such as dinners and parties, except for the actual cost of the consumables furnished at the event.

(b) "Contribution" does not include:

(i) Standard interest on money deposited in a political committee's account;

(ii) Ordinary home hospitality;

(iii) A contribution received by a candidate or political committee that is returned to the contributor within five business days of the date on which it is received by the candidate or political committee;

(iv) A news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political committee;

(v) An internal political communication primarily limited to the members of or contributors to a political party organization or political committee, or to the officers, management staff, or stockholders of a corporation or similar enterprise, or to the members of a labor organization or other membership organization;

(vi) The rendering of personal services of the sort commonly performed by volunteer campaign workers, or incidental expenses personally incurred by volunteer campaign workers not in excess of fifty dollars personally paid for by the worker. "Volunteer services," for the purposes of this section, means services or labor for which the individual is not compensated by any person;

(vii) Messages in the form of reader boards, banners, or yard or window signs displayed on a person's own property or property occupied by a person. However, a facility used for such political advertising for which a rental charge is normally made must be reported as an in-kind contribution and counts towards any applicable contribution limit of the person providing the facility;

(viii) Legal or accounting services rendered to or on behalf of:

(A) A political party or caucus political committee if the person paying for the services is the regular employer of the person rendering such services; or

(B) A candidate or an authorized committee if the person paying for the services is the regular employer of the individual rendering the services and if the services are solely for the purpose of ensuring compliance with state election or public disclosure laws.

(c) Contributions other than money or its equivalent are deemed to have a monetary value equivalent to the fair market value of the contribution. Services or property or rights furnished at less than their fair market value for the purpose of assisting any candidate or political committee are deemed a contribution. Such a contribution must be reported as an in-kind contribution at its fair market value and counts towards any applicable contribution limit of the provider.

(19) "Expenditure" includes a payment, contribution, subscription, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. The term "expenditure" also includes a promise to pay, a payment, or a transfer of anything of value in exchange for goods, services, property, facilities, or anything of value for the purpose of assisting, benefiting, or honoring any public official or candidate, or assisting in furthering or opposing any election campaign. For the purposes of this chapter, agreements to make expenditures, contracts, and promises to pay may be reported as estimated obligations until actual payment is made. The term "expenditure" shall not include the partial or complete repayment by a candidate or political committee of the principal of a loan, the receipt of which loan has been properly reported.

Wash. Rev. Code 42.17.350 Public disclosure commission—Established—Membership—Prohibited activities—Compensation, travel expenses. (1) There is hereby established a "public disclosure commission" which shall be composed of five members who shall be appointed by the governor, with the consent of the senate. All appointees shall be persons of the highest integrity and qualifications. No more than three members shall have an identification with the same political party.

(2) The term of each member shall be five years. No member is eligible for appointment to more than one full term. Any member may be

removed by the governor, but only upon grounds of neglect of duty or misconduct in office.

(3) During his or her tenure, a member of the commission is prohibited from engaging in any of the following activities, either within or outside the state of Washington:

(a) Holding or campaigning for elective office;

(b) Serving as an officer of any political party or political committee;

(c) Permitting his or her name to be used in support of or in opposition to a candidate or proposition;

(d) Soliciting or making contributions to a candidate or in support of or in opposition to any candidate or proposition;

(e) Participating in any way in any election campaign; or

(f) Lobbying, employing, or assisting a lobbyist, except that a member or the staff of the commission may lobby to the limited extent permitted by RCW 42.17.190 on matters directly affecting this chapter.

(4) A vacancy on the commission shall be filled within thirty days of the vacancy by the governor, with the consent of the senate, and the appointee shall serve for the remaining term of his or her predecessor. A vacancy shall not impair the powers of the remaining members to exercise all of the powers of the commission.

(5) Three members of the commission shall constitute a quorum. The commission shall elect its own chair and adopt its own rules of procedure in the manner provided in chapter 34.05 RCW.

(6) Members shall be compensated in accordance with RCW 43.03.250 and in addition shall be reimbursed for travel expenses incurred while engaged in the business of the commission as provided in RCW 43.03.050 and 43.03.060. The compensation provided pursuant to this section shall not be considered salary for purposes of the provisions of any retirement system created pursuant to the general laws of this state.

Wash. Rev. Code 42.17.395 Violations—Determination by commission—Procedure. (1) The commission may (a) determine whether an actual violation of this chapter has occurred; and (b) issue and enforce an appropriate order following such determination.

(2) The commission, in cases where it chooses to determine whether an actual violation of this chapter has occurred, shall hold a hearing pursuant to the Administrative Procedure Act, chapter 34.05 RCW, to make such determination. Any order that the commission issues under this section shall be pursuant to such hearing.

(3) In lieu of holding a hearing or issuing an order under this section, the commission may refer the matter to the attorney general or other enforcement agency as provided in RCW 42.17.360.

(4) The person against whom an order is directed under this section shall be designated as the

respondent. The order may require the respondent to cease and desist from the activity that constitutes a violation and in addition, or alternatively, may impose one or more of the remedies provided in *RCW 42.17.390(1) (b), (c), (d), or (e): PROVIDED, That no individual penalty assessed by the commission may exceed one thousand dollars, and in any case where multiple violations are involved in a single complaint or hearing, the maximum aggregate penalty may not exceed two thousand five hundred dollars.

(5) An order issued by the commission under this section shall be subject to judicial review under the Administrative Procedure Act, chapter 34.05 RCW. If the commission's order is not satisfied and no petition for review is filed within thirty days as provided in RCW 34.05.542, the commission may petition a court of competent jurisdiction of any county in which a petition for review could be filed under that section, for an order of enforcement. Proceedings in connection with the commission's petition shall be in accordance with RCW 42.17.397.

Wash. Rev. Code 42.17.610 Findings. The people of the state of Washington find and declare that:

(1) The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates.

(2) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state

government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions.

(3) Candidates are raising less money in small contributions from individuals and more money from special interests. This has created the public perception that individuals have an insignificant role to play in the political process.

Wash. Rev. Code 42.17.640 Limits specified—Exemptions. (1) No person, other than a bona fide political party or a caucus political committee, may make contributions to a candidate for a state legislative office that in the aggregate exceed *five hundred dollars or to a candidate for a state office other than a state legislative office that in the aggregate exceed *one thousand dollars for each election in which the candidate is on the ballot or appears as a write-in candidate. Contributions made with respect to a primary may not be made after the date of the primary. However, contributions to a candidate or a candidate's authorized committee may be made with respect to a primary until thirty days after the primary, subject to the following limitations: (a) The candidate lost the primary; (b) the candidate's authorized committee has insufficient funds to pay debts outstanding as of the date of the primary; and (c) the contributions may only be raised and spent to satisfy the outstanding debt. Contributions made with respect to a general election may not be made after the final day of the applicable election cycle.

(2) No person, other than a bona fide political party or a caucus political committee, may make

contributions to a state official against whom recall charges have been filed, or to a political committee having the expectation of making expenditures in support of the recall of the state official, during a recall campaign that in the aggregate exceed *five hundred dollars if for a state legislative office or *one thousand dollars if for a state office other than a state legislative office.

(3)(a) Notwithstanding subsection (1) of this section, no bona fide political party or caucus political committee may make contributions to a candidate during an election cycle that in the aggregate exceed (i) *fifty cents multiplied by the number of eligible registered voters in the jurisdiction from which the candidate is elected if the contributor is a caucus political committee or the governing body of a state organization, or (ii) *twenty-five cents multiplied by the number of registered voters in the jurisdiction from which the candidate is elected if the contributor is a county central committee or a legislative district committee.

(b) No candidate may accept contributions from a county central committee or a legislative district committee during an election cycle that when combined with contributions from other county central committees or legislative district committees would in the aggregate exceed *twenty-five cents times the number of registered voters in the jurisdiction from which the candidate is elected.

(4) (a) Notwithstanding subsection (2) of this section, no bona fide political party or caucus political committee may make contributions to a state official against whom recall charges have been filed, or to a political committee having the expectation of making expenditures in support of the state official, during a recall campaign that in the aggregate exceed (i) *fifty cents multiplied by the number of eligible registered voters in the jurisdiction entitled to recall the state official if the contributor is a caucus political committee or the governing body of a state organization, or (ii) *twenty-five cents multiplied by the number of registered voters in the jurisdiction from which the candidate is elected if the contributor is a county central committee or a legislative district committee.

(b) No state official against whom recall charges have been filed, no authorized committee of the official, and no political committee having the expectation of making expenditures in support of the recall of a state official may accept contributions from a county central committee or a legislative district committee during an election cycle that when combined with contributions from other county central committees or legislative district committees would in the aggregate exceed *twenty-five cents multiplied by the number of registered voters in the jurisdiction from which the candidate is elected.

(5) For purposes of determining contribution limits under subsections (3) and (4) of this section,

the number of eligible registered voters in a jurisdiction is the number at the time of the most recent general election in the jurisdiction.

(6) Notwithstanding subsections (1) through (4) of this section, no person other than an individual, bona fide political party, or caucus political committee may make contributions reportable under this chapter to a caucus political committee that in the aggregate exceed *five hundred dollars in a calendar year or to a bona fide political party that in the aggregate exceed *two thousand five hundred dollars in a calendar year. This subsection does not apply to loans made in the ordinary court of business.

(7) For the purposes of RCW 42.17.640 through 42.17.790, a contribution to the authorized political committee of a candidate, or of a state official against whom recall charges have been filed, is considered to be a contribution to the candidate or state official.

(8) A contribution received within the twelve-month period after a recall election concerning a state office is considered to be a contribution during that recall campaign if the contribution is used to pay a debt or obligation incurred to influence the outcome of that recall campaign.

(9) The contributions allowed by subsection (2) of this section are in addition to those allowed by subsection (1) of this section, and the contributions allowed by subsection (4) of this section are in addition to those allowed by subsection (3) of this section.

(10) RCW 42.17.640 through 42.17.790 apply to a special election conducted to fill a vacancy in a state office. However, the contributions made to a candidate or received by a candidate for a primary or special election conducted to fill such a vacancy shall not be counted toward any of the limitations that apply to the candidate or to contributions made to the candidate for any other primary or election.

(11) Notwithstanding the other subsections of this section, no corporation or business entity not doing business in Washington state, no labor union with fewer than ten members who reside in Washington state, and no political committee that has not received contributions of ten dollars or more from at least ten persons registered to vote in Washington state during the preceding one hundred eighty days may make contributions reportable under this chapter to a candidate, to a state official against whom recall charges have been filed, or to a political committee having the expectation of making expenditures in support of the recall of the official. This subsection does not apply to loans made in the ordinary course of business.

(12) Notwithstanding the other subsections of this section, no county central committee or legislative district committee may make contributions reportable under this chapter to a candidate, state official against whom recall charges have been filed, or political committee having the expectation of making expenditures in support of the recall of a state official if the county central committee or legislative district committee is outside of the jurisdiction entitled to elect the candidate or recall the state official.

(13) No person may accept contributions that exceed the contribution limitations provided in this section.

(14) The following contributions are exempt from the contribution limits of this section:

(a) An expenditure or contribution earmarked for voter registration, for absentee ballot information, for precinct caucuses, for get-out-the-vote campaigns, for precinct judges or inspectors, for sample ballots, or for ballot counting, all without promotion of or political advertising for individual candidates; or

(b) An expenditure by a political committee for its own internal organization or fund raising without direction association with individual candidates.

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(4)

No. 07-1153

IN THE

Supreme Court of the United States

VOTERS EDUCATION COMMITTEE *et al.*,

Petitioners,

v.

THE WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF

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DISCUSSION

Petitioner Voters Education Committee ("VEC") replies to the Respondents' Brief in Opposition ("Opposition") to the Petition for Certiorari ("Petition"). The Petition explained that the phrase "support or oppose" is unconstitutionally vague when regulating core First Amendment protected political speech and that the Washington Supreme Court's decision to the contrary creates a division of authority with rulings of several U.S. Courts of Appeals and this Court. The Opposition argues that a footnote by this Court in *McConnell v. FEC*, 540 U.S. 93 (2003), establishes that "support or oppose" is not vague and that the cases discussed in the Petition can be distinguished. But the footnote simply does not have the meaning that the Opposition – and the Washington Supreme Court – attribute to it. And the grounds on which the Opposition seeks to distinguish the contrary decisions of the U.S. Courts of Appeals and this Court do not withstand inspection.

Furthermore, developments since the Petition was filed have provided even more support for granting certiorari. The day before Respondents filed their Opposition seeking to minimize any split in authority, a divided Fourth Circuit opinion intensified the split and embodied it in microcosm. *North Carolina Right to Life, Inc. v. Leake*, No. 07-1438, 2008 WL 1903462 (4th Cir. May 1, 2008).

The *Leake* decision struck down the North Carolina statutory definition of a "political committee" as

unconstitutionally vague with a divided court ruling that proceeded as follows:

- The majority ruled that North Carolina's new "support or oppose" standard was fatally vague unless it was construed to require classic *Buckley v. Valeo* "express advocacy." *Id.* at *7-8. The court struck down an alternative construction of the "support or oppose" standard that allowed consideration of "contextual factors" to determine if speech "goes beyond a mere discussion of public issues in that [it] direct[s] voters to take some action to nominate, elect, or defeat a candidate." *Id.* at *4 (quoting N.C. Gen. Stat. § 163-278.14A(a)(2)).

- By contrast, the dissent cited the Washington case challenged here as demonstrating that North Carolina's "support or oppose" standard could not be held vague in light of footnote 64 of *McConnell*. *Id.* at *42 ("the phrase 'in support of, or opposition to, any candidate' in [the] state['s] political committee definition is not unconstitutionally vague").

The clash between the Fourth Circuit majority ruling and the Washington case is the same clash that exists between the *Leake* majority and the dissent. This new decision refutes the Opposition's assertion (at 24) that there is "no conflict concerning the meaning of [*McConnell*] footnote 64."

The Petition demonstrated that the Washington decision also splits from earlier rulings of the U.S. Courts of Appeals. The Opposition (at 19-21) discounts those rulings, asserting they focused on language in the challenged statutes other than "support or oppose." However, the challenged provisions were held unconstitutionally vague in their entirety. As the Petition pointed out (at 13 n.11) – and as the Opposition does not deny – this could not have occurred if the "support or oppose" language provided clarity.

For example, in *Center for Individual Freedom v. Carmouche*, the Fifth Circuit found vague and narrowed to express advocacy a Louisiana statute regulating spending "supporting, opposing, or otherwise influencing" an election. 449 F.3d 655, 663 (5th Cir. 2006) (quoting La. Rev. Stat. § 18:1483(9)). The Opposition asserts (at 20) that the term "otherwise influencing" was the focus of the vagueness concern. But if that were the only vague term, there would have been no reason for the court to limit the entire phrase to express advocacy as it did. Instead, the court would have construed the provision to apply to "supporting, opposing, or [expressly advocating the election or defeat of]" a candidate. The Opposition does not deny that the express advocacy saving construction was applied with equal force to both the "supporting or opposing" terms of the statute and the "otherwise influencing" term, nor does it explain how such a construction could have occurred if each of those terms were not vague.

The same is true with respect to the Fourth Circuit's pre-*McConnell* decision in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999). There

the Fourth Circuit struck down as vague a provision defining a political committee as a group "to support or oppose any candidate or political party or to influence or attempt to influence" an election. *Id.* (quoting former version of N.C. Gen. Stat. § 163-278.6(14) (amended 1999)). The Opposition cannot explain why all three terms were struck down if the "support or oppose" terms were not vague.

The Opposition similarly attempts, and similarly fails, to explain away the conflict between the decision below and *Buckley v. Valeo*, 424 U.S. 1 (1976). The Petition pointed out that the "supporting or opposing" standard upheld in the challenged Washington decision could not meaningfully be distinguished from "advocating the election or defeat" of a candidate, a standard that was held vague in *Buckley*. Strikingly, the Opposition does not claim that the standards can be distinguished. Instead, it asserts (at 22) that "*Buckley* focused on two other phrases."

Before reaching this Court, the *Buckley* case had been decided by the D.C. Circuit. That court had held that the "two other phrases" referred to by the Opposition were vague and had purported to save them from invalidity by construing them to apply only to speech "advocating the election or defeat" of a candidate. *Buckley*, 424 U.S. at 41-42. This Court agreed with the D.C. Circuit that the "other phrases" were vague, but it went on to reverse the narrowing construction imposed by the D.C. Circuit, holding that the phrase "advocating the election or defeat" also was vague, so that a further narrowing to express advocacy was necessary. *Id.* at 42-44. This was a considered and

explicit ruling, essential to the outcome, and it cannot be squared with the challenged decision's holding that "support or oppose" is not vague and requires no narrowing construction.

The Opposition's assertion (at 19 n.13) that the loyalty oath cases cited by the Petition did not involve the terms "support" or "oppose" is mistaken. *Cramp v. Board of Public Instruction* expressly held that the term "support" was vague. 368 U.S. 278, 286 (1961). And *Cole v. Richardson* summarized a series of cases involving those terms. 405 U.S. 676, 680-81 (1972).

Lastly, the Opposition reinforces the need for this Court to clarify the application of the "support or oppose" standard in footnote 64 of *McConnell*. The Opposition explicitly relies on footnote 64 (at 23-24) – as did the Washington Supreme Court – to justify application of the "support or oppose" standard to all independent political speech, refusing to recognize that it applies only to avowedly campaign-related actors like political parties. The dissent in the new Fourth Circuit decision gave the same mistaken meaning to footnote 64. *Leake*, 2008 WL 1903462, at *42. Given the host of states – and, increasingly, local governments[1] – across the country that employ language like "support or oppose" to regulate political speech, *see* Petition

[1] *See, e.g.*, D.C. Code § 1-1101.01(5) (defining "political committee" as including a group "engaged in . . . promoting or opposing the . . . election of an individual to office); Austin Tex. City Code § 2-2-2(12) (defining "independent expenditure" to be an uncoordinated "expenditure on behalf of, or opposing the election of, any candidate").

Appendix 190a-195a, an authoritative pronouncement is needed. Under our federal system, only this Court can provide that pronouncement and correct the Washington Supreme Court.

CONCLUSION

Certiorari should be granted to review this important issue on which the Washington Supreme Court and the U.S. Courts of Appeals are in conflict.

Respectfully submitted,

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07-1153
No. _____

FILED
APR 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

VOTERS EDUCATION COMMITTEE *et al.*

Petitioners,
v.

THE WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, *et al.*

Respondents.

On Petition For a Writ of Certiorari to the Supreme Court of Washington

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BRIEF FOR THE CENTER FOR COMPETITIVE POLITICS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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APRIL 11, 2008

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

SUMMARY OF ARGUMENT

In 2002, Congress created the "promote, support, attack, or oppose" standard to serve as one of several anti-circumvention measures necessary to implementing the national political-party-committee soft-money ban. Bipartisan Campaign Reform Act of 2002 ("BCRA") Pub. Law No. 107-155 (Mar. 27, 2002). The standard was upheld by this Court against facial challenge when reviewed within a funding restriction on certain communications made by state political party committees. *See* BCRA § 323(b); 2 U.S.C. § 441i(b). This Court held that the

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[1] This brief is filed with the written consent of all parties. No counsel for a party authoring this brief in whole or in part, nor did any person or entity, other than *Amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief.

"support" or "oppose" standard provides "reasonable opportunity" for sophisticated political actors working in state political party committees to "know what is prohibited" with regard to the funding of communications depicting federal candidates. *McConnell v. FEC*, 540 U.S. 93, 170, n.64 (2003) (discussing BCRA § 323(b); 2 U.S.C. § 441i(b)(1)).

Since Congress' efforts in BCRA, many state legislatures have looked to this Court's opinion in *McConnell*, albeit incorrectly, as permission to employ "support" or "oppose" language in establishing a threshold for political committee status. That the Washington Court has now said openly that the words "support" or "oppose" are sufficiently definite to protect issue advocates from the chill of unwarranted investigation should give pause.

It may be that "*Buckley's* intermediate step of statutory construction on the way to its constitutional holding [the "express advocacy" test] does not dictate a constitutional test." *FEC v. Wisconsin Right to Life, Inc., (WRTL II) (plurality opinion)*. Or it may be that "if a permissible test short of the magic-words test existed, *Buckley* surely would have adopted it." *WRTL II,* 127 S. Ct. at 2674 (Scalia, J., concurring). *Amicus* CCP has no way of knowing whether or which test this Court would adopt as the "constitutional standard for clarity ... in the abstract" now that review has shifted from the Federal Election Campaign Act of 1971, construed in *Buckley v. Valeo*, 424 U.S. 1 (1976), to state campaign-finance restrictions. There are two things that CCP does know, however: The "support" or "oppose" standards are not adequate to protect everyday issue advocates from electoral-speech

prosecutions; and no fewer than 30 states are watching to see whether this Court will nonetheless let Washington's standards stand without review.

This Court must take the time to say that while "support" or "oppose" is constitutional to mark a funding restriction for certain communications made by state political party committees, it is not sufficiently defined to protect citizens searching for the line between issue advocacy and advocacy of election or defeat.

ARGUMENT

The Washington Fair Practices Act, Wash. Rev. Code, chapter 42.17 ("FCPA"), defines "political committee" to mean "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." Wash. Rev. Code § 42.17.020(33) (emphasis added). The Supreme Court of Washington held that, under footnote 64 of this Court's opinion in *McConnell v. FEC*, 540 U.S. 93 (2003), the support or oppose standard was not vague and not limited to express advocacy, and should be enforced to regulate speech that implied opposition to a candidate. *Voters Education Committee v. Washington State Public Disclosure Commission*, 166 F.3d 1174 (Wash. 2007).

In BCRA, Congress used the "promote, support, attack, or oppose" standard in two places; only one of which was reviewed by this Court.[2] Congress

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[2] Congress also used "promote, support, attack, or oppose" as the back-up definition of "electioneering communications" in the

enacted BCRA § 323(b); 2 U.S.C. § 441i(b), which required state, district or local party committees to fund "public communications" that mention clearly identified federal candidates with hard money. This Court did not apply that holding to communications run by everyday citizens' organizations, and did not hold that "support" or "oppose" standards were sufficiently clear, standing alone, to subject core speech to regulation. *McConnell v. FEC*, 540 U.S. 93, 170, n.64 (2003).

The standard as-applied to citizens is overly broad and impermissibly vague: the standard is inherently in the eye of the beholder. The truth is that even State party committees making communications find it is safer to spend federal funds (hard money) for any communication that mentions a federal candidate, or not run the communication at all, rather than guess whether regulatory agencies will later determine their communication did, in fact, "oppose" the candidate mentioned. But this Court has repeatedly stated that genuine issue advocacy, to be "uninhibited and robust," can and must encompass the discussion of candidates, *WRTL II*, 127 S. Ct. at 2669 (quoting *Buckley*), and has rejected political committee status -- with its accompanying source prohibitions, contribution limits, and reporting requirements -- as a prerequisite to engaging in issue advocacy that encompasses candidates. *Buckley*, at 42.

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event this Court struck down the primary definition as unconstitutional. 2 U.S.C. § 434(f)(3)(ii). This Court upheld the primary definition of electioneering communication against facial challenge, *see McConnell*, *supra* at 205-06, and had no occasion to address the constitutionality of the backup definition.

("Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions").

In *Buckley*, the Court noted the threat to robust issue discussion that lies within vague statutes. Section 608 (e)(1) of the Federal Election Campaign Act of 1971, as amended (FECA) provided that "[n]o person may make any expenditure ... relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $ 1,000." *Id.* at 39. The Court noted that the "plain effect of § 608 (e)(1)" was to prohibit persons from "voicing their views 'relative to a clearly identified candidate' through means that entail aggregate expenditures of more than $1,000 during a calendar year." *Id.* at 40. Violations would constitute a "federal criminal offense." *Id.*

The *Buckley* court stated that "vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to 'steer far wider of the unlawful zone... than if the boundaries of the forbidden areas were clearly marked.'" *Buckley*, 424 U.S. at 41, n.48, citing *Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972),* quoting *Baggett v. Bullitt, 377 U.S. 360, 372 (1964),* quoting *Speiser v. Randall, 357 U.S. 513, 526 (1958).* The Court noted that "the use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech." It held that "[t]he constitutional deficiencies...can be avoided only by reading § 608 (e)(1) as limited to

communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* at 41-42.

The Washington court's opinion conflicts with the law in at least two federal circuits. The United States Court of Appeals for the Fourth and Fifth Circuits in *Center for Individual Freedom, Inc. v. Carmouche*, 449 F.3d 655, 663(5th Cir. 2006) ("*CFIF*") and *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999) ("*Bartlett*") have held such "support" or "oppose" standards to be vague.

In *CFIF*, the relevant statute required reporting and disclosure if a person made a payment "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person." 449 F.3d at 662-63 (explaining La. Rev. Stat. §§ 18:1501.1(A); 18:1483(9)(a)). The Fifth Circuit found the statute to be vague, and held that:

> To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley's* limiting principle ... and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate.

CFIF, at 665.

The Washington opinion also conflicts with the Fourth Circuit's opinion in *Bartlett*. The North Carolina statute defined a "political committee" as an entity whose purpose is to "support or oppose any candidate or political party or to influence or attempt

to influence the result of an election." N.C. Gen. Stat. § 163-278.6(14). The Fourth Circuit held the definition vague and did not attempt to save the provision because it found that doing so would be contrary to legislative intent. 168 F.3d at 712-13.[3]

The Washington decision promises the chill of First Amendment freedoms nationwide by casting into doubt the meaning of dozens of similar "support" or "oppose" state statutes which had previously been understood as requiring express advocacy. *See* Petition for Writ of Certiorari, at App. N., p. 190a, *Voters Education Committee v. Washington State Public Disclosure Commission*, 166 F.3d 1174 (Wash. 2007). Without a limiting construction from this Court, the Washington statute simply does not supply the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

This Court was again faced with drawing the line between issue advocacy and advocacy of elect or defeat in *McConnell v. FEC*, 540 U.S. 93 (2003). There the Court upheld the definition of "electioneering communication," BCRA § 201(a); 2 U.S.C. § 434(f)(3), "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 205-206 (2003).

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[3] In *Anderson v. Spear*, 356 F.3d 651, 663-65 (6th Cir. 2004), the Sixth Circuit held that a statute defining "electioneering" as the "solicitation of votes for or against any candidate" was "vague" and, *McConnell* notwithstanding, must be construed to require express advocacy).

This Court held that individual organizations may challenge the breadth of the "electioneering communications" definition as-applied to any set of communications they hoped to run. *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*").

In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, _ U.S. _; 127 S. Ct. 2652 (2007) (*WRTL II*), this Court upheld an as-applied challenge to BCRA Section 203, which makes it a crime for a corporation to use its general treasury funds to pay for any "electioneering communication." *Id.* at 2658. There this Court held that an ad is the "functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. Concurring Justices in *WRTL II* expressed doubt that this standard for as-applied challenges to the breadth of the electioneering communications definition was not itself vague. *See WRTL II, supra* at 2674 (Scalia J., joined by Kennedy J. and Thomas J., concurring). But at least the federal electioneering-communication test for genuine issue advocacy "is only triggered if the speech meets the bright-line requirements of BCRA § 203 in the first place." *WRTL II*, at 2669, n.7. The "support" or "oppose" standards in the Washington statute have no clear 30- or 60-day markers before coming into operation.

It may be that *Buckley* did not determine "what the constitutional standard for clarity was in the abstract, divorced from specific statutory language," and that "*Buckley's* intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test." *WRTL II*, at 2669, n.7. Or, it may be that "if a permissible test

short of the magic-words test existed, *Buckley* surely would have adopted it." *WRTL II*, (Scalia, J., concurring). *Amicus* CCP has no way of knowing which test this Court would adopt as the "constitutional standard for clarity ... in the abstract" now that review has shifted from the Federal Election Campaign Act of 1971, construed in *Buckley*, to state campaign-finance restrictions. But it does not appear that any majority of this Court would accept the "support" or "oppose" standard absent some limiting construction as adequate to protect everyday issue advocates from electoral-speech prosecutions. No fewer than 30 states are watching to see whether this Court will nonetheless let Washington's standards stand without review.

This Court must take the time to say that while a "support" or "oppose" standard is constitutional to mark a funding restriction for certain communications made by state political party committees -- themselves already fully regulated "political committees" -- it is not sufficiently defined to protect citizens seeking to avoid the status of "political committee" and searching honestly for the line between issue advocacy and advocacy of election or defeat.

CONCLUSION

Certiorari should be granted to review the decision of the Washington Supreme Court.

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Dated: April 10, 2008

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Supreme Court, U.S.
FILED
APR 9 - 2008
OFFICE OF THE CLERK

No. 07-1153

IN THE

Supreme Court of the United States

VOTERS EDUCATION COMMITTEE, *et al.*,
Petitioners,

v.

WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. For many years, the Chamber and its Institute for Legal Reform ("ILR") have also engaged in independent issue advocacy on topics involving the free enterprise system and administration of justice. In particular, the Chamber was integral to the case below, and it has three specific interests underlying its participation as *amicus curiae*.[1]

First, as part of its voter education and issue advocacy program in 2004, the Chamber donated

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice of the Chamber's intention to file this brief at least 10 days prior to its due date. Pursuant to Rule 37.6, the Chamber states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than the Chamber made any monetary contribution intended to fund the preparation or submission of this brief. The Chamber acknowledges that it paid the legal fees incurred in preparing the Petition for Writ of Certiorari of petitioner Voters Education Committee ("VEC"), which has depleted its funds. The Chamber also expects to pay the legal fees associated with additional submissions by the VEC in this matter.

$1.5 million to petitioner VEC, which the VEC used to fund the advertisement at issue here. The Chamber also participated at material stages of this litigation by responding to a disclosure inquiry by the Washington Public Disclosure Commission ("PDC") in September 2004, by providing non-party discovery to intervenor Deborah Senn, and by filing *amicus* briefs that supported the VEC before the trial court and on appeal.

Second, after the trial court issued its summary judgment ruling (but before the decision of the Washington Supreme Court), Public Citizen filed an enforcement request with the PDC asserting that the Chamber was a "political committee" merely by virtue of its monetary donation to the VEC. On April 3, 2006, the Washington State Attorney General's Office determined that Public Citizen's position appeared to lack merit, but that its enforcement request would be held in abeyance pending the decision of the Washington Supreme Court. The lingering threat of a PDC enforcement action underscores the Chamber's interest here.

Finally, the Chamber has a strong interest in governmental efforts to regulate issue advocacy and voter education programs generally. The Chamber was a named plaintiff in *McConnell v. FEC*, 540 U.S. 93 (2003), for example.[2] Now, this highly-publicized

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[2] The Chamber also participated as an *amicus curiae* in landmark First Amendment cases, including: *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*"); *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); *FEC v. Massachusetts*

(continued...)

Washington case may have significant ramifications in future election cycles for the Chamber's voter education efforts nationwide. The Chamber's interests as a *donor* to the VEC, and thus as a *sub rosa* political speaker, differ from those of the VEC itself and are addressed below.

SUMMARY OF ARGUMENT

This case is about the constitutional limits of state power to require that independent political speakers register with government agencies and publicly disclose the identity of their donors as a precondition to speech. Here, the Washington Supreme Court upheld application to the VEC of a provision of the Washington Fair Campaign Practices Act ("FCPA") imposing onerous registration and disclosure requirements on "political committees." The Act, as codified now and in 2004 when it was applied to the VEC, defines "political committee" vaguely and broadly to encompass any person or entity who "expect[s]" to receive "contributions" or make "expenditures" "in support of, or opposition to, any candidate or ballot proposition." *See* Wash. Rev. Code § 42.17.020(33) (2004) re-codified as Wash. Rev. Code § 42.17.020(39) (2008). Designation ask a "political committee" triggers reporting and disclosure obligations for *all* the entity's activities. Certiorari is appropriate for four reasons.

Citizens for Life, Inc., 479 U.S. 238 (1986) ("*MCFL*"); and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

First, review by this Court could help dispel confusion engendered by the Washington Supreme Court and reaffirm, as *Buckley* held, that an organization may be regulated as a political committee only if its "major purpose" is campaign spending. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Indeed, because the FCPA's vague political committee definition bears no resemblance to the sharply drawn campaign finance statutes that this Court has upheld (*e.g.*, *McConnell*, 540 U.S. at 189-94), only *Buckley's* major purpose analysis could preserve the FCPA as applied here.

Second, this case provides the Court with an opportunity to address the right to anonymous speech by members of or donors to independent issue advocacy groups. Washington's disclosure regime threatens to dampen support for issue advocacy organizations.

Third, granting the VEC's Petition would enable the Court to reaffirm that even a clear statute imposing registration and disclosure requirements on independent, core speech must survive the "exacting scrutiny" required by *Buckley*. 424 U.S. at 64.

Finally, this case would allow a definitive explanation of *McConnell* footnote 64 (540 U.S. at 170 n.64), which the Washington Supreme Court erroneously relied upon as conclusive support for its view that the terms "support" and "oppose" in the FCPA's definition of a political committee were not impermissibly vague. *See* Pet. App. 19a-21a. As shown below (pp. 17-21), the use of these terms

within the detailed provisions of Section 101 of Bipartisan Campaign Reform Act ("BCRA"), 2 U.S.C. § 431(20)(A)(iii) (2002), cannot fairly be compared to the use of the terms in the undefined context of the FCPA.

REASONS FOR GRANTING THE PETITION

I. ESPECIALLY IN THE CONTEXT OF INDEPENDENT SPEECH WITH NO PROSPECT OF CORRUPTING A CANDIDATE, APPLICATION OF A VAGUE "SUPPORT OR OPPOSE" STANDARD RAISES SERIOUS FIRST AMENDMENT CONCERNS.

Comment and debate about issues of public concern are at the very heart of the First Amendment. *Buckley*, 424 U.S. at 14 ("There is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs.") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).[3] Disclosure requirements infringe on both speech and associational freedom. *Id.* at 64-66. Accordingly, "precision of drafting and clarity of purpose are

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[3] Decades of jurisprudence and dozens of decisions addressing the scope of the First Amendment in political speech cases cannot and should not obscure a vexing irony: as speech gets closer to the very core of the First Amendment, it is subject to increasing regulation. The Founding Fathers would certainly be stunned to learn that a payment for a sign that reads "Vote for Joe" can be more extensively regulated than payment for one that says "Eat at Joe's."

essential" to such requirements. *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975).

The consequences to a speaker of being deemed a "political committee" under the FCPA are severe. As in many campaign finance statutes, once the FCPA deems an entity a "political committee," the entity incurs reporting obligations not only for the activities deemed to "support or oppose" a candidate, but for *all* its activities, even those with no possible political purpose. Wash. Rev. Code § 42.17.090 (2004).[4] Plainly, the burdens attendant to a designation as a "political committee" are sufficient to deter speech. Review of that designation here is warranted for several reasons.

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[4] A Washington appellate court described these extensive reporting obligations in a case involving the Washington Education Association:

> A finding that WEA was a political committee would require WEA to file detailed reports to the PDC of all bank accounts, all deposits and donations, and all expenditures, including the names of each person contributing funds. . . All funds would have to be reported, even those used for traditional labor union activities not connected with electoral campaign activity, such as collective bargaining, member representation, and other teacher assistance.

State ex rel. Evergreen Freedom Found. v. Wash. Education Ass'n, 49 P.3d 894, 902 (Wash. Ct. App. 2002).

A. The Statutory Definition of "Political Committee" Is Vague and Overbroad, and as Construed, Is at Odds With Common Understanding.

As explained in the VEC's Petition (at 12-16), the FCPA's definition of a political committee suffers problems of vagueness because it does not precisely articulate the activities that are subject to registration and disclosure. It defines a political committee as:

> [A]ny person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

Wash. Rev. Code § 42.17.020(33). In addition to the reasons set forth by the VEC, granting the Petition would afford the Court an opportunity to reaffirm *Buckley* and its progeny by evaluating two aspects of the vagueness – and overbreadth – of the challenged FCPA provision.

First, the Washington Supreme Court's decision expands the definition of a "political committee" beyond common understanding to absurd dimensions. To avoid constitutional infirmity, *Buckley* construed the term political committee "narrowly" to encompass only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. *See also MCFL*,

479 U.S. at 252 n.6 (holding that a non-profit corporation did not qualify as a political committee because its "central organizational purpose [was] issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates."). For an organization to qualify as a political committee under the "major purpose" test, it must engage in "extensive" spending on express advocacy communications (*i.e.*, independent expenditures). *Id.* at 262.

In sharp contrast, the Washington Supreme Court's construction of "political committee" is so sweeping that many organizations and entities may be unwittingly caught within the regulation's net. On its face, the FCPA encompasses a breathtaking number of activities and subjects all manner of organizations that engage in even one of these activities to registration and reporting requirements for all their activities regardless of the groups' overarching purposes. Under the FCPA, for example, a neighborhood book club that raises money from its four participants ("contributions") to purchase four yard signs ("expenditures") supporting a "ballot proposition" to increase public library funding could be deemed a political committee, even if the "major purpose" of all other club donations is to support activities besides campaign spending (*e.g.*, beverages and books). More draconian still, the club would need to report its other activities as well. Ignoring its own precedent, the Washington Supreme

Court did not consider these consequences in upholding the FCPA as applied to the VEC.[5]

Second, the FCPA's definition of a political committee does not resemble the detailed and narrowly drawn campaign finance statutes that have passed constitutional muster in previous decisions of this Court. For example, in *McConnell*, the Court upheld a precisely-tailored regulation of "electioneering communications." *See* 540 U.S. at 189-94 (upholding 2 U.S.C. § 434(f)(3)(A)(i)). To qualify as an "electioneering communication," the speech was required to: (i) be broadcast on radio or television; (ii) refer to a current candidate for federal office; (iii) be aired within the candidate's electoral market and be available to at least 50,000 people; (iv) promote, support, attack, or oppose the candidate; (v) be aired within 60 days of a general election, or within 30 days of a primary election; and (vi) be paid for with corporate or union funds. *See* 2 U.S.C. § 434(f)(3)(A)(i).

The FCPA's political committee definition lacks any such specificity, sweeping in "any" person, entity, or organization with a mere "expectation" of receiving contributions or making expenditures "in support of, or opposition to" any candidate, or even "any ballot proposition." The statute responds to the "who," "what," "when," "where," and "how" questions

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[5] Previously, the Washington Supreme Court applied the "primary purpose" test to hold that even an incumbent's campaign committee was not a "political committee." *See State v. Dan J. Evans Campaign Comm.*, 546 P.2d 75, 79 (Wa. 1976).

with "anyone," "anything," "anytime," "anywhere," and "anyhow." One would have thought such a remarkably broad statute would be facially invalid on numerous grounds. *See Bellotti*, 435 U.S. at 776 (invalidating restrictions on corporate speech concerning a ballot proposition); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 297-99 (1981) (invalidating contribution limitations as applied to committee formed to support a ballot proposition). The Court's review of the FCPA would aid in elucidating the constitutional limitations on political committee regulations.

B. Having Found the Washington Statute Not Vague, the Lower Court Ignored *WRTL*.

Even if, contrary to this Court's precedents, the Washington Supreme Court correctly found the definition of "political committee" not vague, it ignored this Court's recent ruling in *WRTL*. Although this Court had upheld the "electioneering communications" definition in BCRA, it concluded in *WRTL* that the statute as applied to the advertisement at issue was overbroad because the statute, though clear, swept in speech that was entitled to First Amendment protection. The advertisement in *WRTL* was not the "functional equivalent of express advocacy," meaning that it was "susceptible of [at least one] reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667.

After deciding that the "support or oppose" definition of political committee was not unconstitutionally vague, the Washington Supreme Court held that a determination of whether the VEC's advertisement constituted express advocacy was "unnecessary" and "decline[d] to reach the issue of whether VEC's advertisement constituted express advocacy or issue advocacy." Pet. App. at 25a-26a, 32a. This ruling was plainly wrong; *WRTL* holds that even a clear statute cannot be applied to regulate protected speech.

C. Disclosure Obligations Like Those in the Washington Statute Seriously Implicate First Amendment Rights.

In connection with the core freedom of association, the right to support the discussion of public issues anonymously without fear of retaliation is protected by the First Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342, 346-47 (1995) (invalidating prohibition on anonymous campaign literature such as leaflets, in part because such anonymous speech enabled a speaker to ensure that its message was not prejudged based upon a listener's bias toward the speaker).[6] Unless

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[6] *Accord Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199–200 (1999) (invalidating requirement that individuals wear identification badges when circulating petitions for signatures because it "discourage[d] participation in the petition circulation process by forcing name identification without sufficient cause"). *See also Watchtower Bible & Tract Soc'y of N.Y. Inc. v. Vill. of Stratton*, 536 U.S. 150, 160, 166–67 & n.14 (2002) (invalidating permit requirement for door-to-door

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narrowly construed, seemingly boundless disclosure requirements like those contained in the FCPA threaten to abrogate these rights by requiring the public identification of private persons who donate funds to organizations engaged solely in issue-related speech.[7]

As Alexander Hamilton, James Madison, and John Jay demonstrated by disseminating *The Federalist Papers* under the pseudonym "Publius," anonymity can be vital to public discourse. Not only does anonymous communication protect speakers from the consequences of espousing unpopular views, it also allows ideas to be communicated on their own merits without allowing the speaker's identity to detract from the message. By assuming that all anonymity is nefarious, disclosure statutes such as the FCPA can place heavy burdens on the associational freedom of independent issue advocacy organizations and their individual participants.[8] In

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canvassers because it would compel them to "forgo their right to speak anonymously," thus "deter[ring]" their speech).

[7] "The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be . . . 'effective.'" *Buckley*, 424 U.S. at 65-66 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

[8] The notion that voters are entitled to know which speakers are "hiding behind" organizational names goes much too far. For example, the Democratic National Committee, the Republican National Committee, the AFL-CIO, the ACLU, National Right to Life, and indeed the Chamber itself are no

(continued...)

addition to the administrative costs of disclosure, disclosure laws deter participation and financial support. *See NAACP*, 357 U.S. at 462-63 (holding that freedom of association was infringed by law requiring disclosure of independent issue advocacy group's rank-and-file membership).

This threat to "anonymous speech" is manifest in this case. Once the Chamber was disclosed as the donor supporting the VEC's activities, Ms. Senn's counsel intervened in the case and initiated deposition and document discovery of the Chamber and its officers. This broad and costly inquiry by itself "raise[d] First Amendment concerns." *WRTL*, 127 S. Ct. at 2669. As shown above (p. 2), Public Citizen went even further, urging the PDC to deem the Chamber a "political committee," and thus require it to disclose *its donors*, based solely upon its monetary donation to the VEC. The Washington Attorney General's Office questioned the merits of this enforcement request, but held it in abeyance pending resolution of this case by the Washington Supreme Court. The VEC's Petition gives this Court the opportunity to provide the proper interpretive framework for registration and disclosure statutes.[9]

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more than the sum of their constituent parts. It is a fool's errand – not to mention a serious infringement of associational freedom – to determine the point at which an entity must disclose its constituent parts as a price for speaking on public issues.

[9] The possibility that the Washington Supreme Court's decision could lead to the retroactive designation of entities like the Chamber as "political committees" has significant speech-

(continued...)

D. When Political Speech Is Concerned, Statutory Mandates Must Be Precise.

Even a clear disclosure statute does not overcome First Amendment concerns, however, unless it survives "exacting scrutiny." The Washington Supreme Court's assertion that "disclosure requirements d[o] not prevent anyone from speaking," Pet. App. at 28a (quoting *McConnell*, 540 U.S. at 201) misses the point. Exacting scrutiny "is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. "Exacting scrutiny" allows interference with the freedom of association only if the government has "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25. *Accord McIntyre*, 514 U.S. at 347 ("exacting scrutiny" requires regulation to be *narrowly tailored* to serve an *overriding* state interest); *Bellotti*, 435 U.S. at 786 (state interest must be "compelling").

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chilling ramifications for donors to such entities because, for example, 14 of the states identified in the VEC's petition (Pet. App. at 190a-95a) *prohibit* corporate donations to political committees. *See* ARIZ. REV. STAT. § 16-919.A; COLO. CONST. art. 28, § 3(4); KY. REV. STAT. ANN. §§ 121.035, 121.150(21); MASS. GEN. LAWS ch. 55, § 8; MICH. COMP. LAWS § 169.254; MONT. CODE ANN. § 13-35-227; N.C. GEN. STAT. §§ 163-278.15(a), 19(a); N.D. CENT. CODE § 16.1-08.1-03.3(1); OKLA. STAT. TIT. 74, ch. 62 Appx. § 257:10-1-2(d); R.I. GEN. LAWS § 17-25-10.1(h); TENN. CODE ANN. § 2-19-132; TEX. ELEC. CODE ANN. § 253.094; W. VA. CODE § 3-8-8; and WYO. STAT. ANN. § 22-25-102.

The Court has identified three interests potentially served by recordkeeping and disclosure laws: (1) aiding the electorate by providing information on the sources of candidate funds and candidate spending; (2) gathering data to detect violations of campaign contribution limits; and (3) deterring corruption and the appearance of corruption. *Buckley*, 424 U.S. at 66-68. Because each of these interests focuses on the financial benefits that are provided directly to candidates by means of contributions, none are sufficient to justify regulation of *independent spending*.[10]

Imposition of disclosure requirements on independent spending is also unrelated to deterrence of corruption. Neither of the recognized forms of corruption – *quid pro quo* exchanges or the purportedly corrosive influences of immense wealth – are attributable to independent political speakers. *Id.* at 66-68 (identifying corruption arising from improper commitments by candidates in exchange for favors). Independent spending often provides "little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 47. Absent pre-arrangements or coordination with candidates, independent speech cannot improperly

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[10] This Court has correctly observed that there is a "fundamental constitutional difference" between independent speech and direct campaign contributions that has led to stricter scrutiny of regulations impacting independent speech. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614 (1996) (quoting *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 497 (1985)).

influence candidates or public officials through *quid pro quo* transactions. *Id.*

Here, not only was the VEC's challenged advertisement created and broadcast independently of any candidate or political party, any claim of a *quid pro quo* fails because the purported beneficiary of the advertisement, Washington Attorney General Robert McKenna, is the very same public official whose office is pursuing this action *against* the VEC for broadcasting it.

Nor could a purported interest in thwarting "the corrosive and distorting effects of immense aggregations of wealth," *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990), support the vague and overbroad regulation here. The Court has upheld regulations based on this interest only when the regulated communications contain express advocacy or the functional equivalent of express advocacy. *Id. See also WRTL*, 127 S. Ct. at 2667; *MCFL*, 479 U.S. at 249, 257-58 (explaining the corruption rationale for protecting the "marketplace of political ideas" from the "corrosive and distorting effects" of corporate-funded *express advocacy*). Because the Washington Supreme Court deemed the existence of express advocacy to be irrelevant to the FCPA's application, it could not have relied on the interest identified in *Austin*.[11]

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[11] The Chamber submits that this case provides a vehicle for the Court to revisit *Austin*'s controversial "corrosion and distortion" rationale. *See* Thomas F. Burke, *The Concept of*

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The Washington Supreme Court failed to consider whether its expansive construction of the statute could survive exacting scrutiny. Therefore, this case provides an opportunity for the Court to reassert the importance of this constitutional standard.

II. FOOTNOTE 64 OF *MCCONNELL* DOES NOT SUPPORT THE DECISION BELOW.

Eschewing any application of *Buckley's* "express advocacy" limitation to the FCPA's political committee definition, the Washington Supreme Court relied upon the "federal election activity" restriction set forth in Section 101 of BCRA to justify its holding that the terms "support" and "oppose," as employed in the FCPA, were not unconstitutionally vague. *See* Pet. App. 19a-21a. *McConnell's* ruling upholding BCRA § 101, however, does not support the decision below because the two laws have markedly different contexts and statutory constructions. *See McConnell*, 540 U.S. at 170 n.64. This case presents an opportunity for the Court to clarify the meaning of *McConnell* footnote 64 to prevent the Washington Supreme Court's erroneous

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Corruption in Campaign Finance Law, 14 CONST. COMMENTARY 127, 133-36, 149 (1997) (explaining that the "distortion" rationale defines corruption too broadly); Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM & MARY L. REV. 587, 610-30, 641 (Spring 1991) (arguing that *Austin* is inconsistent with *Buckley* because it allows the government to combat corruption by "leveling the playing field" of political spending).

interpretation from sowing confusion among the lower courts. *See* VEC Pet. at 12-16.

BCRA §101 regulates federal election activity by requiring state and local party committees, all of which are already subject to extensive state and federal regulation, to use only federal funds for clearly identified "public communications." The restriction applies only to:

> a *public communication* that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that opposes or supports a candidate for that office (regardless of whether the communication expressly advocates a vote for or against the candidate).

BCRA, § 101, 2 U.S.C. § 431(20)(A)(iii) (2002) (emphasis added). To add more clarification, BCRA defines a "public communication" as:

> a communication by means of any broadcast, cable, satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public advertising.

Id., 2 U.S.C. § 431(22).

This restriction on federal election activity is clearly distinguishable from the FCPA's definition of a political committee. "Federal election activity" is

very carefully defined so that the independently vague terms "support" or "oppose" are applicable only to an extremely narrow scope of expression described within BCRA.[12] There are specific guidelines on: (1) who is being regulated (state, district, and local political party committees); (2) what activities are covered (communications about clearly identified federal candidates); and (3) what means of communications are encompassed in the restrictions (ten enumerated modes including broadcasts, written publications, and telephone calls). *See id.*

The FCPA lacks the precision of section 101 of BCRA. For example, the FCPA defines its regulated population as "any person," which includes nearly every conceivable individual or entity.[13] Furthermore, essentially any financial activity – namely, "contributions" and "expenditures" – undertaken in connection with political speech appears to trigger registration and disclosure requirements.[14] Finally, the Washington statute

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[12] *McConnell* did not hold that the terms "support" or "oppose" would not be vague standing alone. VEC Pet. at 17-18.

[13] A "person" includes "an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized." WASH. REV. CODE § 42.17.020(30). Only candidates and individuals spending personal funds are exempt. *Id.* § 42.17.020(33).

[14] "Contributions" cover an array of transactions, including, for example: a loan; gift; forgiveness of indebtedness;

(continued...)

restricts not only speech involving candidates, but also speech involving "any ballot proposition."

The perils of such a wide-ranging regulation would be particularly acute for organizations like the Chamber, which routinely interact with state and federal officials who appear as guest speakers at issue-based forums, round-table discussions, and banquets. It is not idle conjecture to fear that any expense paid for by an organization sponsoring such an event could be viewed as "supporting" an officeholder-candidate and would require reporting of the entire spectrum of the organization's financing and activities. The predictable consequence of this regime would be the cessation of the these valued activities, resulting in a profound chill on independent political speech and issue discussion.

In sum, because the population of speakers covered by the FCPA is so large and the categories of speech regulated are so expansive, the FCPA requirements based upon whether one "supports" or "opposes" a candidate are not susceptible to the same degree of precision as is BCRA's public communication provision. Accordingly, the Washington Supreme Court's attempt to save the FCPA's definition of a "political committee" by

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donation; advance; payment; *or anything of value*. WASH. REV. CODE § 42.17.020(14). An "expenditure" also includes numerous transactions, some of which are: a payment; contribution; loan; advance; or gift of money or *anything of value*. *Id.* § 42.17.020(19).

analogy to the "public communication" provision of BCRA is specious. If anything, the comparison emphasizes the relative vagueness and overbreadth of the FCPA.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to grant the VEC's Petition.

Respectfully submitted,

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April 2008

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